Supreme Court, U.S.
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No. 07-48

IN THE

Supreme Court of the United States

MARSHA SEIBER and ALVIN SEIBER,
Petitioners,

v.

STATE OF OREGON, by and through the
OREGON STATE BOARD OF FORESTRY,
Respondent.

Petition for a Writ of Certiorari to the Oregon Court of Appeals

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) When evaluating a claim concerning the regulatory takings of commercial timber under the Just Compensation Clause of the Fifth Amendment to the United States Constitution and the standard of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), must a court consider the effect of the government regulation on the value of the particular timber taken from a tract, or instead on the value of the entire tract of real estate, including the timber not taken?

(2) Do the Fifth and Seventh amendments to the Constitution, taken together, guarantee the right of jury trial in regulatory takings cases in state courts?

PARTIES TO THE PROCEEDING

The only parties to the proceeding are Petitioners Marsha and Alvin Seiber and Respondent State of Oregon.

CORPORATE DISCLOSURE STATEMENT

There are no corporate parties.

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Petition for a Writ of Certiorari to the Oregon Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Petitioners Marsha and Alvin Seiber respectfully petition for a writ of certiorari to review the decision of the Oregon Court of Appeals in *Seiber v. Oregon Board of Forestry*, 149 P.3d 1243 (Or. Ct. App. 2006), as to which the Oregon Supreme Court denied review.

OPINIONS BELOW

The appellate judgment, entered on June 7, 2007, is reproduced as Appendix A ("App. A"). The April 10, 2007 decision of the Oregon Supreme Court denying review is reproduced as Appendix B ("App. B"). The December 27, 2006 decision of the Oregon Court of Appeals is reproduced as Appendix C ("App. C"). The April 24, 2002 opinion letter of The Honorable Daniel R. Murphy is reproduced as Appendix D ("App. D").

STATEMENT OF JURISDICTION

The Oregon Supreme Court denied Petitioners' petition for review on April 10, 2007. (*See* App. B.) This Petition is timely filed within 90 days of that judgment. 28 U.S.C.A. § 2101(c) (West 2006). The Court has jurisdiction pursuant to 28 U.S.C.A. § 1257(a) (West 2006).

CONSTITUTIONAL PROVISIONS INVOLVED

The federal constitutional provision at issue in this case is the Takings or Just Compensation Clause of the Fifth Amendment, which provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The Takings Clause is made applicable to the states through the Due Process Clause of the Fourteenth Amendment, which provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

Also at issue in this case is the Seventh Amendment, which provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

Petitioners were prohibited from harvesting timber on their property based upon Oregon Administrative Rule 629-665-0210 (2002), formerly numbered 629-024-0809, the pertinent parts of which provide:

> (1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl (Strix occidentalis caurina), the

operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:

(a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;

(b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site. . . .

(2) For the purposes of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State forester to have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding. . . .

. . . .

(5) Exceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act.

This rule is reproduced in its entirety as Appendix E. Also involved are Oregon Administrative Rules 629-680-0000 (2002), formerly numbered 629-056-0010; 629-680-0010(5) (2002), formerly numbered 629-056-0020(5); 629-680-0100(1) (2002), formerly numbered 629-056-0100(1); and 629-680-0220 (2002), formerly numbered 629-056-0220, which declare, define, and together provide for the protection of such sites as public resources. Each of these rules is reproduced in Appendices F through I, respectively.

The U.S. Fish and Wildlife Service (the "FWS") is authorized to issue an incidental take permit ("ITP") for the "taking"

of a threatened species under section 10 of the Endangered Species Act of 1973 (the "ESA"), 16 U.S.C.A. § 1531, *et seq.* (West 2000 & Supp. 2006). *See* 16 U.S.C.A. § 1539 (West 2000).

STATEMENT OF THE CASE

A. Facts Material to the Question Presented.

1. The Seibers Own and Manage a Family Tree Farm.

Petitioners in this regulatory takings case, Marsha and Alvin Seiber, own approximately 200 acres of property in Linn County, Oregon. About 185 to 190 acres consist of commercial timber lands. (*See* March 27, 1998 Final Order of the Oregon State Board of Forestry ("BOF"), affirming the Oregon State Forester's ("OSF") denial of Petitioners' right to log subject timber, reproduced as Appendix J ("App. J").)

2. The State Prevented the Seibers from Harvesting Their Timber Through Enforcement of State Regulations.

In 1990, the OSF adopted an interim spotted owl policy precluding timber harvest within a 70-acre core area "of the best available suitable owl habitat" in the vicinity of the nest site. (*See* Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl, U.S. Fish and Wildlife Service Region 1, July 1990, reproduced as Appendix O ("App. O"), at 86a.) BOF subsequently adopted former Oregon Administrative Rule 629-024-0809 (presently numbered 629-665-0210), which requires protection of a 70-acre core area of suitable owl habitat encompassing the nest site. (*See* App. E.)

Because a pair of northern spotted owls had been discovered nesting on an adjacent landowner's property near the northern edge of the Seibers' property, in 1993 the OSF des-

ignated approximately 40 acres of the Seibers' merchantable timber (the "subject timber") as protected spotted owl habitat. In January 1994, Petitioners notified the OSF that they wished to log some of their timber, but the OSF did not allow Petitioners to log it because of its protected habitat designation. (*See* App. J.)

In February 1998, Petitioners again advised the OSF of their desire to log the subject timber. (*Id.* at 34a.) Petitioners provided a written logging plan, which stated that Petitioners would not conduct logging operations while spotted owls might be nesting in the area (March 1 to September 30), or until any young spotted owls had fledged, in order to avoid any incidental harm to them. (*Id.*) The OSF denied Petitioners' plan on the ground that it failed to describe how the operation would provide a 70-acre core area of suitable habitat consistent with the requirements of Oregon Administrative Rule 629-665-0210(1)(a). (*Id.*) Petitioners were unwilling to designate any of their timber for use as a public wildlife preserve for spotted owls. (*Id.* at 35a.)

Petitioners then appealed the OSF's denial of their logging plan to BOF. In March 1998, BOF entered a final order that affirmed the OSF's denial of Petitioners' right to log the subject timber. (*Id.* at 51a.)

3. The State Appellate Court of Last Resort Denied Petitioners Relief Below.

After entry of the final order, Petitioners commenced an inverse condemnation action in Linn County Circuit Court, alleging a taking under the state and federal constitutions. Petitioners alleged, among other claims, a taking under the Fifth and Fourteenth amendments to the U.S. Constitution under this Court's decision in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). The trial court denied the State of Oregon's motion for summary judgment as to that claim.

On August 3, 2001, after Petitioners had filed their complaint but before trial, the State declared the nesting site abandoned and lifted the logging restrictions on Petitioners' land. (*See* Second Amended Complaint filed November 19, 2002, reproduced as Appendix K ("App. K"); August 3, 2001 letter to from the OSF to Petitioners, reproduced as Appendix L ("App. L").) Petitioners then amended their complaint to reflect the conversion of the taking from permanent to temporary.

The case went to trial in November 2003, and a jury was asked, among other things, to decide both liability and the amount of just compensation as to petitioner's *Penn Central* claim. The State moved for directed verdict as to that claim, but the trial court denied the motion.

The jury decided all claims in Petitioners' favor by a special verdict, as follows:

> Question 1: Were the plaintiffs denied all economically viable or productive use of the subject 40 acres of timber while the ban on harvesting it was in effect?
>
> Answer: Yes.
>
> Question 2: Did the subject regulation advance a legitimate state interest:
>
> (a) In that regard, did it single out the plaintiffs to bear a burden that should be borne by the public as a whole?
>
> Answer: Yes.
>
> (b) Did it require plaintiffs to provide nesting habitat if they were not a cause of the spotted owl being listed as a species threatened with extinction?
>
> Answer: Yes.
>
> Question 3: When compared with the plaintiffs' right to make economic productive use of the property, including their reasonable investment-backed expecta-

tions, was it necessary for the State to prevent them from harvesting 40 acres of their timber for a period of seven years in order to ensure the survival of the spotted owl as a species?

Answer: No.

Question 4: What was the fair market value of the subject 40 acres of timber in January 1994?

Answer: $333,000.

Question 5: What was the fair market value of the subject 40 acres of timber in August 2001?

Answer: $258,000."

(*See* Jury Interrogatories dated November 12, 2003, reproduced as Appendix M ("App. M").)

The court entered judgment for $148,473 and awarded Petitioners attorneys' fees under Oregon Revised Statutes § 20.085. (*See* General Judgment and Money Award, signed by The Honorable Daniel R. Murphy in the trial court, reproduced as Appendix N ("App. N").)

Petitioners appealed, arguing that the trial court had erred as a matter of law in its award of interest and attorneys' fees. The State cross-appealed, in part on the grounds that the trial court had erred in failing to grant its motions for summary judgment and directed verdict as to Petitioners' *Penn Central* claim. The Oregon Court of Appeals, applying the "whole parcel" rule, determined, in part, that the trial court had erred in denying the State's motion for directed verdict as to the *Penn Central* claim. App. C. (*Seiber v. Or. Bd. of Forestry*, 149 P.3d 1243 (Or. Ct. App. 2006).) It made that determination, first, by considering what it termed the "undisputed historical facts" presented at trial. Second, the court considered the jury findings in its special verdict – in particular, the findings in Questions 1, 4, and 5 that Petitioners were "denied all economically viable or productive use of the subject 40

acres of timber while the ban on harvesting it was in effect," and that Petitioners' property value had diminished during the period of regulation. However, the court discounted those findings because "[i]n light of the 'whole parcel' rule . . . the answers to those questions are of limited relevance because they do not call on the jury to consider the use of the 40 acres, or its loss of value, in the context of [Petitioners'] entire 200 acres." *Id.* at 1247. The court concluded, based on those considerations, that Petitioners had not made out a *Penn Central* claim as a matter of law and that, therefore, the trial court had committed legal error in denying the State's motions for summary judgment and directed verdict as to that claim.

Petitioners submitted a petition for review to the Oregon Supreme Court, requesting that the court review the decision of the Oregon Court of Appeals. That petition was denied. Petitioners now seek a writ of certiorari from this Court.

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10(b) lists among the considerations governing review on certiorari the circumstance in which a state court of last resort has decided a federal question in a way that conflicts with the decision of a federal court of appeals. In this case, the decision was rendered by a lower appellate court, and the state court of last resort refused to grant review. (Apps. C & B.) Under Supreme Court Rule 10(c), a ground for review exists when a state court has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. All of those grounds for review are present in this case.

A. This Case Involves an Important Constitutional Question That Should Be Resolved by This Court.

1. The "Whole Parcel" Rule Does Not Apply to a Claim Under the *Penn Central* Line of Cases.

The Fifth Amendment provides that private property shall not be taken for public use, without just compensation. This Court has articulated a number of ways in which a plaintiff may assert a claim for a taking under the Fifth Amendment. In *Penn Central*, 438 U.S. 104, the Court addressed when a plaintiff may assert a claim for a regulatory taking in which a government regulation deprives a plaintiff of partial value in his or her property. The Court recognized that the purpose of the Fifth Amendment's guarantee against takings without just compensation was to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 123 (internal quotation marks and citation omitted). However, the Court noted that there was no set standard for determining when the federal constitution required a government entity to compensate citizens whose property had been devalued by government regulation. *Id.* at 123-24. The Court then enumerated several factors that courts should evaluate in making case-by-case inquiries, stating:

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Id. at 124 (citations omitted).

In explaining those factors, the Court in *Penn Central* noted that the determination of whether a regulatory taking has occurred should focus "the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." *Id.* at 131-32. Despite that dicta, the Court's cases following *Penn Central* make clear that *Penn Central* provides a distinct theory of recovery that does not require a plaintiff to prove that his or her "whole parcel" of property was affected by government regulation. In *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005), the Court stated:

> [W]e reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories discussed above—by alleging a "physical" taking, a Lucas-type "total regulatory taking," [or] a *Penn Central* taking . . ..

The Court has stated in cases following *Penn Central* that the multifactor test enunciated in that case provides a remedy when a non-total regulatory taking occurs. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 n.8 (1992), the Court noted that when landowners have not been denied all economically productive use of their property, they may still seek compensation based on Penn Central's multifactor test. Likewise, in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Court held that the plaintiff could proceed under a *Penn Central* theory, even though he was only prohibited from developing a portion of his property. In *Palazzolo* the Court stated:

> Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.

Id. at 617.[1] Again, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 332-34 (2002), the Court held that the petitioners could not state a cause of action for a total temporary regulatory taking under *Lucas*, but that the petitioners could seek recovery for a partial temporary taking under *Penn Central*.

In summary, this Court's cases following *Penn Central* indicate that the "whole parcel" rule does not apply to claims under *Penn Central*. The Oregon Court of Appeals erred when it held otherwise.

In addition, the whole parcel rule should not apply in this instance, when the taking involves, not the land as a whole, but a distinct and separate natural resource on the land. As this Court stated in *Palazzolo*:

> [Plaintiff] argues, for the first time, that the upland parcel is distinct from the wetlands portions, so he should be permitted to assert a deprivation limited to the latter. This contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. See [Frank I.] Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation Law," 80 Harv. L.Rev. 1165, 1992 (1967). Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, see, *e.g., Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470, 497, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987); but we have at times expressed discomfort with the logic of this rule, see *Lucas, supra,* at 1016-1017, n.7, 112 S.Ct. 2886, a sentiment echoed by some commentators, see, *e.g.,* Epstein, Takings: Descent and Resurrection, 1987 S.Ct. Rev. 1, 16-17 (1987); Fee,

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[1] One consideration in that analysis may be the extent to which the regulation affects severable resources, such as timber or minerals, which have value independent of the property itself.

> Unearthing the Denominator in Regulatory Takings Claims, 61 U. Chi. L.Rev. 1535 (1994). Whatever the merits of these criticisms, we will not explore the point here.

Palazzolo, 533 U.S. at 631.

As Professor Richard Epstein points out in his article cited in *Palazzolo*, the denominator problem involved in the "whole parcel" rule was first discussed by Professor Michelman and he rejected the rule, although Justice Stevens in *Keystone* infers Michelman's support for it. Richard Epstein, *Takings: Descent and Resurrection*, 1987 Sup. Ct. Rev. 1, 16-17 (1987).

Epstein then quotes from the foregoing Michelman article:

> "Inasmuch as mining rights are well recognized, divisible interests in land, and inasmuch as 'rights' to particular surface uses have come to be recognized as species of 'property' under the label of 'easement' or 'servitude,' why not say that any land consists of two 'things'—mining rights and surface rights, or foundry rights and residue—and that the relevant denominator in testing a regulation which impinges only on mining rights or foundry rights is the value of those rights—which the regulation totally destroys?"

Id. (quoting Michelman, *supra*, at 1193).

Referring to the Court's statements concerning the whole parcel rule in both *Penn Central* and *Keystone*, Professor Epstein goes on to state:

> [N]o amount of precedent can render coherent a position that is not. The general principle of eminent domain law has always been, and logically must be, this: What has the state taken, and not what has the owner retained.

Id. at 17.

The record in this case provides a sound foundation upon which the Court can clarify the law. The fact that the govern-

ment left other timber undisturbed completely ignores the loss to the Seibers in not being able to harvest the 40 acres.

The Oregon Court of Appeals' result would have been different if it had used the correct standard. Viewing Petitioners' claim in light of the correct *Penn Central* standard, there was sufficient evidence to conclude that the State effected a compensable regulatory taking against Petitioners and that the taking imposed burdens that the public as a whole should have borne. As described above, *Penn Central* requires the consideration of a number of factors, including "the economic impact of the regulation on the claimant," against the necessity of the government regulation. Petitioners presented evidence, in part, that they lost significant income because many of the trees in the protected area became infected with root rot that caused them to blow down during the seven years that the logging ban was in effect. Petitioners also presented evidence that the State had prevented them from harvesting "blowdowns" and clearing space for the planting of trees that would have provided future crops. In addition, despite the Oregon Court of Appeals' statement that Petitioners "were free to sell future contingent logging interests," 149 P.3d at 1247, Petitioners presented evidence that there was no market for future interests from such a small parcel.

In addition, the taking of Petitioners' trees was compensable because the subject regulation singles Petitioners out to bear a burden that is not imposed upon many of their neighbors who own commercial timberlands. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 835 (1987); *Tahoe-Sierra*, 535 U.S. at 341. The subject regulation does not require that all owners of commercial timberlands set aside timber to provide nesting habitat for spotted owls; it is directed only at those who happen to have an existing nesting site on their property or within the 70-acre protected area. Spotted owls generally require mature or old-growth timber for nesting sites. App O at 78a-79a. Many of Petitioners' neighbors, in-

cluding the federal government, have harvested much, if not all, of their mature timber in the area, and are now harvesting replacement crops of trees before they reach maturity in order to avoid having them become spotted owl habitat.[2] As one scholar has pointed out, "only latecomers bear the cost of protecting listed species, even though, from a broader perspective, it is the early developers who brought the species to near extinction in the first place." Bradley C. Karkkainen, *Biodiversity and Land*, 83 Cornell L. Rev. 1, 93 (Nov. 1997). Professor Karkkainen goes on to state: "The costs are heavily concentrated on a relatively small number of individuals that compose a distinct subgroup of a much larger beneficiary class." *Id.* at 95. In this case, Petitioners derive no benefit from having their timber designated as a public "resource" spotted owl nesting site. Or. Admin. R. 629-680-0000, 629-680-0010. During the years that this case has been pending, they have annually paid taxes on the subject 40 acres, while at the same time they have been barred from deriving any income from the timber crop on it. In the meantime, much of

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[2] The federal government owns 558,000 acres of land in Linn County, Oregon, or 40 percent of the total acreage. Atlas of Oregon at 84 (University of Oregon, 2d ed. 2001). The U.S. Forest Service manages 468,000 acres (32 percent) of timberlands and the Bureau of Land Management ("BLM") manages another 90,000 acres (6 percent) of timberlands in Linn County, Oregon. *Id.* Under the Department of Interior's Recovery Plan, the FWS ended up protecting as critical habitat on federal lands 7.5 million acres, or a little less than half (48 percent) of the total acreage available as spotted owl roosting and foraging habitat on federal lands. Recovery Plan at ix. The FWS did not designate any private lands as critical habitat for the owls. *Id.* at 4. With regard to the Western Oregon Cascades' spotted owl "province," which includes that portion of Willamette National Forest in Linn County, the Recovery Plan states: "Owl populations within this province are moderately high, as is the amount of remaining habitat on federal lands. Areas with low owl numbers occur on 1) private lands, 2) checkerboard BLM lands at lower elevations, 3) checkerboard Forest Service lands in the Santiam Pass area, and 4) higher elevation forests near the Cascade Crest." *Id.* at 51.

the subject timber has blown down because of root rot and the wood is no longer of merchantable quality.[3]

As another scholar has stated: "Unlike zoning regulations that spread the burdens and benefits so as to create an average reprocity of advantage, the ESA [and state regulations such as the subject one based upon it] burdens only a few landowners who unfortunately provide a habitat for a protected species." Stephen P. Foley, Comment, *Does Presenting a "Take" Constitute an Unconstitutional "Taking"?: An Analysis of Possible Defenses to Fifth Amendment Taking Claims Based on the Endangered Species Act*, 14 UCLA J. Envtl. L. & Pol'y 327, 344 (1995-96).

By failing to provide compensation to those owners who do have spotted owl nesting habitat, the government is encouraging other owners of private timberlands to manage their timber so that trees are harvested earlier, before they can become suitable spotted owl nesting habitat. *See* Ike C. Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 Cumb. L. Rev. 1, 45 (1993-94). Otherwise, as in this case, an occupation by owls will render landowners' timber without any commercial value. The government's short-sighted policy serves neither the best interests of the owls nor of those citizens whose timber is appropriated for owl habitat.

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[3] In an attempt to satisfy the "ripeness" requirement for a regulatory takings claim as put forth in *Boise Cascade Corp. v. Oregon State Board of Forestry*, 991 P.2d 563, 573-74 (Or. Ct. App. 1999), Petitioners prepared a habitat conservation plan as required by the ESA and submitted an ITP application to the FWS for the owls. After denying Petitioners an ITP because they would not agree to place harvest restrictions on their other timber, the FWS determined that because of the extensive "blowdowns" in the protected area, there was no longer enough timber left standing to make it a suitable nesting site. The FWS by letter dated June 3, 2002 withdrew its objection to Petitioners' harvesting the subject timber. The letter is reproduced as Appendix P.

BEST AVAILABLE COPY

Under Oregon law, the State has prohibited its agencies from exercising the power of eminent domain to condemn conservation easements for wildlife habitat. Or. Rev. Stat. § 271.725(1). Instead, by regulation the State forces landowners to leave in its natural state any habitat the State desires to be occupied by wildlife by simply declaring it to be a public resource. Or. Admin. R. 629-680-0000, 629-680-0010.

As Justice Holmes stated in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922): "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Given the magnitude of the evidence supporting Petitioners' economic loss, there was evidence from which to conclude that Petitioners' loss outweighed the necessity of the regulation and that Petitioners should have been compensated. As explained in Petitioners' discussion of the right to jury trial, that issue was for a jury to decide.

2. The Constitution Guarantees the Right to Jury Trial in Takings Cases in State Court.

The Seventh Amendment does not provide a right to jury trial when a plaintiff alleges a violation of an ordinary federal statute in a state court proceeding. *Minn. & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916), *cited with approval by this Court in Osborn v. Haley*, 127 S. Ct. 881, 900 n.17 (2007). However, the Seventh Amendment, together with the Fifth Amendment, does protect a plaintiff who asserts a federal regulatory takings claim in state court.

The Fifth Amendment, through the Fourteenth Amendment, guarantees to private citizens a right to compensation for property taken by the government, whether that govern-

ment be state or federal. *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897). The Fifth Amendment's provision against regulatory takings also applies in state court proceedings. *Id.* That guarantee consequently limits the scope of state authority at its most fundamental level, including denying to states the option of routing takings claims solely to state court judges, and not the general citizenry acting through juries. Whether the right derives from the very nature of the Fifth Amendment itself, or from the confluence of the Seventh Amendment and Fifth Amendment, a private citizen has a right to jury trial in the specific context of an inverse takings claim, even though the Seventh Amendment does not otherwise provide a right to jury trial in state court proceedings. That logic is not novel. Applying similar logic in a different context, this Court already has determined in at least one case that the federal claim at issue was so inseparable from the right to a jury trial that a state was obligated to provide a jury even though the Seventh Amendment did not command it. *See Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 363 (1952).[4]

Petitioners bringing a regulatory takings claim under the Fifth Amendment thus have a right to a jury trial as to issues of fact. This Court already has ruled that the issue of "whether a landowner has been deprived of all economically viable use of his property," although a mixed question of law and fact, "is a predominantly factual question" to be decided by a jury. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720 (1999).

In this case, the Oregon Court of Appeals ignored the jury's findings and determined for itself whether Petitioners

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[4] Although the Seventh Amendment's provision for a jury trial informs the analysis of a jury trial right under the Fifth Amendment, the Fifth Amendment alone is sufficient to provide the right. *Cf. First English Lutheran Church v. Los Angeles County*, 482 U.S. 304, 315 (1987) (referring to "self-executing" nature of Takings Clause).

had been deprived of all economically viable use of their property. As described above, the court rejected the jury findings on Questions 1, 4, and 5 – that Petitioners were "denied all economically viable or productive use of the subject 40 acres of timber while the ban on harvesting it was in effect," and that Petitioners' property value had diminished during the period of regulation – because it determined that those findings were relevant only to the affected portion of the parcel, not to the parcel as a whole. The court, in a feat of logical legerdemain, then proceeded to determine for itself that the parcel as a whole was not denied all economically viable or productive use. When it made that determination, the court usurped the jury's function and denied Petitioners their constitutional right to a jury trial as to that factual issue.

CONCLUSION

Petitioners respectfully urge the Court to grant their Petition for Writ of Certiorari.

Respectfully submitted,

PHILLIP D. CHADSEY *
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* Counsel of Record

Counsel for Petitioners

July 9, 2007

APPENDIX

APPENDIX A

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

[Filed: December 27, 2006]

010333; A127237

MARSHA SEIBER and ALVIN SEIBER,
Appellants-Cross-Respondents,

v.

STATE OF OREGON, by and through the Board of Forestry,
Respondent-Cross-Appellant.

Appeal from Circuit Court, Linn County
Daniel R. Murphy, Judge
Argued and submitted August 30, 2006

Philip D. Chadsey argued the cause for appellants-cross-respondents. With him on the briefs were Charles F. Adams and Stoel Rives LLP.

Denis G. Fjordbeck, Assistant Attorney General, argued the cause for respondent-cross-appellant.

Before Brewer, Chief Judge, and Schuman and Rosenblum, Judges.

SCHUMAN, J.

Reversed on cross-appeal; appeal dismissed as moot.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent on appeal; cross-appellant on cross-appeal.

[x] Costs allowed, payable by: Appellants on appeal; cross-respondents on cross-appeal.

MONEY AWARD

Judgment #1

Creditor(s): State of Oregon, by and through the Board of Forestry

Attorney: Denise Fjordbeck, 1162 Court NE #400, Salem, OR 97031

Debtor(s): Marsha Seiber; Alvin Seiber

Attorney: Charles Adams

Costs: $ 512.16

Attorney fees: $ -0-

TOTAL AMOUNT: $ 512.16

Interest: Simple, 9% per annum, from the date of this appellate judgment

Appellate Judgment
Effective Date: June 7, 2007

COURT OF APPEALS
(seal)

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF OREGON

Court of Appeals
A127237
S054522

MARSHA SEIBER and ALVIN SEIBER,
Plaintiffs-Appellants,
Cross-Respondents,
Petitioners on Review,

v.

STATE OF OREGON, by and through the Board of Forestry,
Defendant-Respondent,
Cross-Appellant,
Respondent on Review.

ORDER DENYING REVIEW

Upon consideration by the court.

The court has considered the petition for review and orders that it be denied.

April 10, 2007 /S/ PAUL J. DE MUNIZ
DATE PAUL J. DE MUNIZ
CHIEF JUSTICE

c: Charles F Adams
Denise G. Fjordbeck

jk

APPENDIX C

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

[Filed: December 27, 2006]

010333; A127237

MARSHA SEIBER and ALVIN SEIBER,
Appellants-Cross-Respondents,

v.

STATE OF OREGON, by and through the Board of Forestry,
Respondent-Cross-Appellant.

Appeal from Circuit Court, Linn County
Daniel R. Murphy, Judge
Argued and submitted August 30, 2006

Philip D. Chadsey argued the cause for appellants-cross-respondents. With him on the briefs were Charles F. Adams and Stoel Rives LLP.

Denise G. Fjordbeck, Assistant Attorney General, argued the cause for respondent-cross-appellant. With her on the briefs were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.Before Brewer, Chief Judge, and Schuman and Rosenblum, Judges.

SCHUMAN, J.

Reversed on cross-appeal; appeal dismissed as moot.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent on appeal; cross-appellant on cross-appeal

[ ] No costs allowed.

[x] Costs allowed, payable by: Appellants on appeal; cross-respondents on cross-appeal

[ ] Costs allowed, to abide the outcome on remand, payable by:

SCHUMAN, J.

In 1994, the Oregon Board of Forestry denied plaintiffs' application to harvest timber from 40 acres located within a 200-acre parcel that they owned. The denial resulted from application of a rule protecting spotted owl nesting sites. Plaintiffs brought claims against the state and the board, seeking compensation for a "taking" under Article 1, section 18, of the Oregon Constitution,[1] and the Fifth and Fourteenth Amendments to the United States Constitution.[2] The jury returned a verdict in plaintiffs' favor. Plaintiffs appeal, assigning error to the amount of attorney fees that the trial court awarded them. The state cross-appeals, assigning error to the trial court's denial of its motions for directed

[1] Article I, Section 18, of the Oregon constitution provides in part:

"Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation[.]"

[2] The Takings Clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, *see Chicago, B. & Q. R. Co. v. Chicago*, 166 US 226, 17 S Ct 581, 41 L Ed 979 (1897), provides that "private property" shall not "be taken for public use, without just compensation."

verdicts on the takings claims under the federal and state constitutions. We agree with the state that the trial court should have granted its motions for directed verdicts. We therefore reverse on the cross-appeal. Because plaintiffs are no longer the prevailing party, they are not entitled to any attorney fees. We therefore dismiss the appeal as moot.

The following facts are not in dispute. Plaintiffs acquired approximately 200 acres of land near Sweet Home, Oregon, in 1986. Almost all of the property was commercial timberland, although there was a residence on it as well. In 1993, a spotted owl nesting site was identified on land adjacent to plaintiffs' parcel. An Oregon Department of Forestry rule provides for the protection of 70 acres around such a site. *Former* OAR 629-24-809 (June 6, 1991), *renumbered as* OAR 629-665-0210 (June 1, 1997). The protected area included 40 acres of plaintiffs' parcel. Thus, beginning in January 1994, plaintiffs were prohibited from logging on those 40 acres. The prohibition did not prevent them from logging the remaining portion of their parcel.

In 1998, plaintiffs brought a claim against the state, alleging that application of the spotted owl regulation had resulted in a taking of their property and that they were therefore entitled to compensation. The court dismissed their claim, however, on the ground that it was not ripe for adjudication because they had not attempted to obtain an "incidental take permit" from the United States Fish and Wildlife Service. *See Boise Cascade Corp. v. Board of Forestry*, 164 Or App 114, 128-33, 991 P2d 563 (1999) (requiring exhaustion of administrative remedies before takings claim is ripe). Plaintiffs then made such an application, and, when it was denied, filed the present action in February 2001. In August 2001, before the litigation was complete, the nesting site was deemed abandoned, and the state withdrew the restriction. Plaintiffs then amended their complaint to allege a temporary taking instead of a permanent one.

At trial, plaintiffs argued that the state's denial of logging permits constituted a "regulatory taking" under Article I, section 18, of the Oregon Constitution, because it denied them economic use of the protected 40 acres within their 200-acre parcel. Plaintiffs relied on this court's opinion in *Coast Range Conifers v. Board of Forestry*, 189 Or App 531, 550, 76 P3d 1148 (2003), *rev'd*, 339 Or 136, 117 P3d 990 (2005), which rejected the so-called "whole parcel" rule and held that, in order to determine whether a regulation deprived a landowner of all economically viable use of property so as to constitute a taking under Article I, section 18, the appropriate "property" to examine was the affected portion of a landowner's parcel.

Plaintiffs also sought relief under the federal Takings Clause. They invoked *Penn Central Transp. Co. v. New York City*, 438 US 104, 130-31, 98 S Ct 2646, 57 L Ed 2d 631 (1978) (*Penn Central*), under which the question of whether a government regulation amounts to a taking depends on the particular circumstances of each case; *Lucas v. South Carolina Coastal Council*, 505 US 1003, 1015, 112 S Ct 2886, 120 L Ed 2d 798 (1992), under which a taking occurs when government has deprived a claimant of all economically productive use of property; and *Agins v. Tiburon*, 447 US 255, 260, 100 S Ct 2138, 65 L Ed 2d 106 (1980), under which a regulation will be held to violate the Takings Clause if the regulation "does not substantially advance legitimate state interests."

The state moved for directed verdicts on the state and federal claims. The trial court denied the motions, the claims went to the jury, and the jury returned a verdict in favor of plaintiffs. The court entered a judgment awarding plaintiffs $148,473 plus attorney fees in the amount of $211,333. This appeal and cross-appeal ensued.

While the appeal and cross-appeal were pending, the Oregon Supreme Court decided *Coast Range Conifers v. Board of Forestry*, 339 Or 136, 117 P3d 990 (2005), reversing this court's decision in that case and holding that the

"whole parcel" rule *does* apply to a taking claim under Article I, section 18, of the Oregon Constitution. That rule now provides the starting point for evaluating whether a regulation's effect is so great as to constitute a taking. *Coast Range Conifers*, 339 Or at 150. The rule is straightforward: "Under Article I, section 18, of the Oregon Constitution, a court should consider a property owner's ability to use the whole parcel that he or she owns in determining whether the property retains any economically viable use." *Id.* Where a plaintiff owns a contiguous parcel, the court must consider the plaintiffs' ability to use the entire parcel, "not merely the * * * acres of timber that the regulation affects." *Id.* Simply put, where the parcel considered as a whole retains some economically viable use, "the challenged regulation does not effect a taking under Article I, section 18, of the Oregon Constitution." *Id.* at 151.

Based on that principle, the court in *Coast Range Conifers* affirmed summary judgment in favor of the state on an Article I, section 18, takings claim that presented facts substantially similar to the ones here. In that case, the state Board of Forestry denied the plaintiff a permit to log nine acres of a contiguous 40-acre parcel after bald eagles, a protected species, were discovered on the property. It was undisputed that the challenged regulation left the "plaintiff able to log more than three fourths of its property." *Coast Range Conifers*, 339 Or at 151. In light of those facts, and applying the whole parcel rule, the court held that the trial court correctly concluded that the state was entitled to prevail as a matter of law. *Id.*

Similarly, in this case, plaintiffs retained economic use of their contiguous 200-acre parcel despite the temporary prohibition against logging the 40 acres that had been subject to state regulation. Plaintiffs' counsel conceded to the trial court, "We'll stipulate that [plaintiffs] were not denied all economic value of the 200 acres." Because the state did not

deprive plaintiffs of all economically viable use of the entire parcel, the trial court erred in denying the state's motion for a directed verdict on plaintiffs' claim under Article 1, section 18.

The trial court also erred in denying the state's motion for a directed verdict on defendant's federal claim, which, as noted above, had three counts. The count based on *Agins* fails, because that case was overruled in *Lingle v. Chevron U.S.A., Inc.*, 544 US 528, 540 45, 125 S Ct 2074, 161 L Ed 2d 876 (2005). The count based on *Lucas* also fails because, under that case, no taking occurs unless the application of the state regulation renders claimant's entire parcel devoid of all economic value. *Lucas*, 505 US at 1015; *Coast Range Conifers*, 339 Or at 152; *see also Penn Central*, 438 US at 130-31 ("whole parcel" rule applies to regulatory takings); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 US 302, 331, 122 S Ct 1465, 152 L Ed 2d 517 (2002) (same); *Concrete Pipe & Products of Cal, Inc. v. Construction Laborers Pension Trust for Southern Cal*, 508 US 602, 644-45, 113 S Ct 2264, 124 L Ed 2d 539 (1993) (same).

The third federal count—the one based on *Penn Central*—requires a bit more discussion. The parties agree that, even if a claimant has no claim under *Lucas* because some economic value remains despite the regulation, the claimant may still have a *Penn Central* claim. *See Tahoe-Sierra Preservation Council, Inc.*, 535 US at 335 (temporary regulatory taking requires *ad hoc* examination of relevant factors). According to *Penn Central*, whether a regulation effects a taking depends in large part on

> "several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the

> character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."

438 US at 124 (citations omitted). Where the historical facts material to the regulatory takings claim are undisputed, whether a regulation has effected a taking with respect to a particular plaintiff is a question of law to be resolved by the court. *Coast Range Conifers*, 339 Or at 155 ("*Penn Central* makes clear that the question whether the undisputed historical facts establish that a challenged regulation effects a taking presents a question of law for the court.").

We therefore begin our *Penn Central* analysis by recapitulating the relevant undisputed historical facts. The interference with plaintiffs' use of the entire 200 acre-parcel was limited in area, time, and interest; it affected only 40 of plaintiffs' 200 acres, it lasted only seven years, and it applied only to one "stick" in plaintiffs' "bundle" of property rights, that is, the right to harvest timber. During the period when the restriction was in place, plaintiffs were permitted to log elsewhere on the approximately 200-acre parcel, and they were free to sell future contingent logging interests in the regulated area. Moreover, although plaintiffs had plans to sell timber from the regulated area in the future, at the time the permit was denied, the state's action did not interfere with any then-existing transactions between plaintiffs and others to log the regulated area. *See Penn Central*, 438 US at 130 ("[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable.").

Plaintiffs emphasize that, in addition to those undisputed historical facts, the jury made additional relevant findings. The jury returned the following "jury interrogatories":

> "Question 1: Were the plaintiffs denied all economically viable or productive use of the subject 40 acres of timber while the ban on harvesting it was in effect? [Answer:] Yes.
>
> "Question 2: Did the subject regulation advance a legitimate state interest:
>
> > "(a) In that regard, did it single out the plaintiffs to bear a burden that should be borne by the public as a whole? [Answer:] Yes.
> >
> > "(b) Did it require plaintiffs to provide nesting habitat if they were not a cause of the spotted owl being listed as a species threatened with extinction? [Answer:] Yes.
>
> "Question 3: When compared with the plaintiffs' right to make economic productive use of the property, including their reasonable investment-backed expectations, was it necessary for the State to prevent them from harvesting 40 acres of their timber for a period of seven years in order to ensure the survival of the spotted owl as a species? [Answer:] No.
>
> "Question 4: What was the fair market value of the subject 40 acres of timber in January 1994? [Answer:] $333,000.
>
> "Question 5: What was the fair market value of the subject 40 acres of timber in August 2001? [Answer:] $258,000."

The jury's answers to questions 1, 4, and 5 are, indeed, findings of historical fact that are supported by evidence in the record. In light of the "whole parcel" rule, however, the answers to those questions are of limited relevance because

they do not call on the jury to consider the use of the 40 acres, or its loss of value, in the context of plaintiffs' entire 200 acres. Question 2, by its phrasing, applies to plaintiffs' *Agins* claim, which, we have decided, cannot survive *Lingle*. In any event, part (a) of question 2 does not ask for a determination of historical fact. By asking whether plaintiffs' burden "should" have been borne by the public, the question asks for a legal conclusion or, at the most, a finding of ultimate (as opposed to historical) fact. Part (b) of question 2 is, of course, undisputable: nobody ever asserted that plaintiffs are responsible for the endangered status of the spotted owl. Question 3, like question 2(a), does not call for a finding of historical fact; rather, it requires the jury to weigh the plaintiffs' economic harm, including their investment-backed expectations, against the public benefit to be derived from the survival of the spotted owl as a species. That is precisely the legal issue that the court must decide based on undisputed historical facts. *Coast Range Conifers*, 339 Or at 155.

We turn, then, to that issue. We conclude, and plaintiffs do not contend to the contrary, that the regulation affecting plaintiffs' interests does not effect a physical appropriation of plaintiffs' property; rather, it is part of a "public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 US at 124. The rule authorizing the state's action is part of a regulatory plan developed to ensure maintenance of forestland "consistent with sound management of * * * wildlife resources and scenic resources * * * and to ensure the continuous benefits of those resources for future generations of Oregonians." ORS 527.630(1). Therefore, the character of the government action does not weigh heavily in plaintiffs' favor. *Penn Central*, 438 US at 124.

On the facts presented, viewed in light of the "whole parcel" rule that is now the governing principle in both Oregon and federal takings cases, we conclude that the

temporary deprivation of logging rights to 20 percent of plaintiffs' property, pursuant to a statutory and regulatory plan to preserve resources for "future generations of Oregonians," was not a taking. The Supreme Court in *Coast Range Conifers* concluded that the *permanent* prohibition on logging nine acres of a 40-acre parcel—22.5 percent—under a regulatory scheme almost identical to the one that the state used in the present case, did not amount to a taking. 339 Or at 155. In this case, plaintiffs present an even less compelling set of circumstances.

Reversed on cross-appeal; appeal dismissed as moot.

APPENDIX D

CIRCUIT COURT OF OREGON
TWENTY-THIRD JUDICIAL DISTRICT

April 24, 2002

Phillip D. Chadsey, Esq
Standard Insurance Center
900 SW Fifth Ave., Suite 2600
Portland, OR 97204

Karen L. Moynahan, Esq
Department of Justice
1162 Court Street NE
Salem, OR 97301

Re: Seiber v. State of Oregon (Board of Forestry)
Linn County Case Number: 01-0333

Counsel:

This matter comes before the court on a motion for partial summary judgment filed by plaintiff and for summary judgment by defendant. A motion for summary judgment is to be granted where there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ORCP 47C. The moving party has the burden to showing this. *Seeborg v. General Motors Corp.*, 284 Or 695, 699 (1978). As a result of the 1995 amendments to ORCP 47C and the decision in *Jones v. General Motors Corp.*, 325 Or 404 (1997) the court must find that no objectively reasonable juror could return a verdict for the adverse party before a summary judgment is granted.

All evidence, and reasonable inferences drawn therefrom, is viewed in the light most favorable to the party opposing the motion. *Double Eagle Golf, Inc. v. City of Portland*, 322 Or 604, 606 (1996).

Plaintiff's Motion for Partial Summary Judgment on Liability (filed 07.23.01).

> 1. Asserted: Plaintiffs have been denied all economically viable use of their timber constituting a per se taking of their property by defendant's action in denying

plaintiff's a logging permit.—**Allowed as to Claim 3, Count 1.**

This is a narrow issue. Plaintiff's submitted an affidavit setting forth that they had lost economic use of the timber because of the denial of the cutting permit. No evidence was submitted to refute that. The amount of damages remains at issue, but the fact that plaintiffs have been denied all viable use of their timber for a limited time is not rebutted. This motion is allowed as to the *Lucas* claim (Claim 3, Count 1).

2. Asserted: Defendant lacked authority to adopt a regulation that works an unconstitutional taking; therefore OAR 629-665-0210 must be declared invalid.—**Decision deferred.**

This court is mindful of the consequence a ruling on this motion could have. The plaintiff touched on this briefly in their memorandum and the State wrote little or nothing on it. This court cannot determine whether the State's lack of response on this issue is because they consider the motion to be totally frivolous or because they lack a credible argument against it. On this motion only the court will defer ruling at this time. Plaintiff is allowed 20 days to file additional memoranda on this issue and the State is allowed 20 days to respond. After the court reviews additional memoranda the court will decide whether additional oral argument is necessary.

To assure that this is not delayed unnecessarily the following time table is established:

Deadline for plaintiff to file supplemental memoranda on this motion: May 14, 2002.

Deadline for defendant to file supplemental memoranda on this motion: June 4, 2002.

Deadline for Court to review memoranda and decide on need for oral argument: June 14, 2002.

Deadline for Court to rule absent oral argument: June 21 2002.

Defendant's Motion for Summary Judgment
(filed 08.10.01) (ORCP 21A; 47B)

1. Asserted: Standard for summary judgment. Not at issue.

2. Asserted: Issues alleged in plaintiffs' first claim are pending before the Court of Appeals and therefore barred from litigation before this court: ORCP 21A(3)—**Allowed.**

Defendant argues that the issues alleged in plaintiffs' first claim are pending before the Court of Appeals and are therefore barred from litigation in this court. The first claim seeks declaratory relief to find and administrative rule [OAR 629-665-0210] unconstitutional because it works a taking under the theory set forth in *GTE Northwest, Inc. v. PUC*, 321 Or 458 (1995). Plaintiff argues, inter alia, "Defendant's regulatory-takings theory under *Loretto* was based upon the government having authorized a physical occupation of the landowner's property. In Boise Cascade 1999 (sic) the court of appeals (sic) held that because the State has no control over where spotted owls nest, the subject regulation did not require the landowner to submit to an occupation of its land. [¶] In this action, plaintiffs' First Claim is not based on *Loretto*, nor is it based on the federal constitutional takings law. Rather, it is based on the Oregon Supreme Court's decision in *GTE Northest, Inc. v. PUC* [citation omitted]. In *GTE Northwest*, the court did find that a rule of the defendant agency required an occupation of the plaintiffs' property, **thus requiring the payment of compensation under federal constitutional takings law, based on *Loretto***. (emphasis added) (Plaintiffs' Reply Memorandum at page 9). That appears to be a distinction without a difference at least until the Court of Appeals rules on the *Loretto* claim currently

on appeal. Technically plaintiff may be arguing a different route, but the destination is exactly the same. This court would rather not litigate this issue twice, therefore the first claim is barred in this court pending the appeal.

> 3. Asserted: All of the plaintiffs' claims should be dismissed because the circuit court does not have subject matter jurisdiction. ORCP 21A(1).—**Denied.**

This defense was struck down in *Boise Cascade Corp. v. Board of Forestry*, 131 Or App 538 at 546, (1994), *affmd.* 325 Or 185 (1997) where the court held that the remedy in a takings claim such as these calls not for a review of not what the Board of Forestry *did*, but rather for what that action *caused*. The claim here is not that the BOF acted in error to restrict the logging, but rather that in so doing the BOF sustained a government action that constituted a taking under applicable Constitutional Law and that plaintiff is entitled to compensation under taking law[1].

> 4. Asserted: Plaintiffs' first and second claims and third claim (count one) are barred by the doctrine of issue preclusion as they have already been litigated and decided on their merits before an administrative law judge.—**Denied.**

The BOF and the Circuit Courts have concurrent jurisdiction over this matter, but only the Court can provide a jury trial to which the plaintiff is entitled on the taking issue. Under the *Boise Cascade* ruling and cases cited therein, issue preclusion does not apply as it would violate the Seventh Amendment to the US Constitution[2]. In addition plaintiff cited ample authority for their argument that it is the courts, and not the agency, that decides a taking issue. (Plaintiff s Reply Memo-

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[1] *See also*: *Dunn v. City of Redmond*, 303 Or 201, 204 (1987).

[2] 325 Or at 196; see also *Drews v. EBI Companies*, 310 Or 134, 139 (1990).

randum, pages 10-11). While the Oregon appellate decisions seem to have largely danced around the "fox in the hen house" argument the US Supreme Court cases cited are more direct.

> 5. Asserted: Plaintiffs' third claim, counts two and three, are barred by the doctrine of issue preclusion as they are merely specified theories of the federal taking claim that was previously litigated and decided by the administrative law judge.—**Denied.**

This is denied on the same grounds as number 4 above.

> 6. Asserted: Plaintiffs' second and third claims are moot as they are now free to harvest the timber on their property in accordance with the rules of the Oregon Forest Practices Act without application of OAR 629-665-0210.—**Denied.**

The mootness argument would have merit if the claim were for a permanent taking. However, plaintiff has countered that their claim is for a temporary taking which would not be moot because the owls have now left and the area may be logged. The issue may be whether there are any true damages rather than whether there was a compensable taking.[3]

> 7. Asserted: Plaintiffs' first claim is invalid as the Declaratory Judgment Act does not waive state sovereign immunity.—**Denied.**

Defendants argue that the Declaratory Judgment Act does not waive the state sovereign immunity requirements set forth in Oregon Constitution, Article IV, §24. This is true. However the taking claims are based separately on constitutional provisions, Article 1, §18 which are not superceded by §24 and the Declaratory action merely addresses the taking issue provided for in the Constitution. *Tomasek v. Oregon High-*

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[3] *Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992).

way Comsn, 196 Or 120, 143 (1952). Therefore, the claim is not invalid.

> 8. Asserted: Plaintiffs' second claim is void for failure to state a claim as it is based on Measure 7, which has been permanently stayed.—**Denied.**

Defendant argues that the Second Claim is void because it is reliant upon the provisions in "Ballot Measure 7" which have been permanently stayed. Plaintiff argues that BM 7 is not required to state or support this claim because BM 7 only provides for additional damages, and not a separate basis for the taking claim. Plaintiffs are correct in this.

> 9. Asserted: Plaintiffs' second claim is void for not being ripe as it is based upon Measure 7 which has been permanently stayed.—**Denied.**

Same answer as to number 8 above.

> 10. Asserted: Plaintiffs' third claim, count one (*Lucas*) is void as they have not been deprived of all economic use of their property.—**Denied.**

Defendant argues that the so called *Lucas* claim (Third Claim) is barred because the plaintiffs were not deprived all economic use of their property. This argument apparently is based on the concept that the land underlying the timber could be put to another use even though the plaintiffs were denied use of the timber. However, the Court in *Boise Cascade*, 131 Or 544-545, see also 325 Or at 198-200, held that timber was a severable asset from the fee estate and all economic loss in the timber would constitute a basis for a taking claim.

> 11. Asserted: Plaintiffs' third claim, count two (*Agins*) is void as the language of the complaint attempts to mislead this court by taking the language of the statute entirely out of context where proper reading denies the claim.—**Denied.**

Defendants argue that plaintiff has somehow attempted to mislead the Court by citing ORS 496.192(1) and not (2) of the same provision. This Court does not see any misleading here as these provisions read together are not inconsistent with the plaintiffs' claim for a taking. This relates back to the same concept touched on earlier, that the claim in this case is not that the protection of wildlife is not proper or that the temporary bar on logging was illegal, but rather that the application of these provisions acted to constitute a taking for which plaintiff may be compensable. There is nothing about 496.192 taken in parts or as a whole that is inconsistent with that reasoning.

> 12. Asserted: Plaintiffs' third claim, count three (*Penn Central*) fails to show an investment-backed expectation that has been deprived by application of OAR 629-665-0210.—**Denied.**

Defendants argue that the plaintiffs failed to make a good faith effort to seek an acceptable "ITP" (Incidental Take Permit) from the US Forest Service which have possibly allowed limited logging of the area. They argue that this failure precludes them from now arguing that they have sustained an action for a taking which might have been awarded had they continued to pursue the ITP. This argument would have compelling merit if the plaintiffs were suing the United States or the US Forest Service, but they are not, they are suing the Oregon Board of Forestry. Plaintiff cites authority fully supporting their position that the state agency cannot argue that failure to exhaust an administrative procedure in the federal agency bars their claim at the state level.

> 13. Asserted: Alternative counter claim for title to realty.—**Dismissed.**

The counter claim for title to the property should be dismissed on the grounds that the plaintiff is not seeking and

cannot recover for a permanent taking in this case and therefore there is no basis for a transfer of title.

Sincerely yours,

/s/ Daniel R. Murphy
DANIEL R. MURPHY
Circuit Judge

APPENDIX E

Oregon Administrative Rule 629-665-0210 (2002)

Interim Requirements for Northern Spotted Owl Nesting Sites

(1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl (Strix occidentalis caurina), the operator must submit to the State Forester a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:

(a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;

(b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site. Such disturbances must be prevented during the critical period of use for nesting. The critical period of use is the time period between March 1 and September 30, each year.

(2) For the purposes of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State Forester to have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding. Such determination must be supported by repeated observation of the owls in close proximity or observation of nesting behavior.

(3)(a) For the purposes of this rule, suitable spotted owl habitat means and includes:

(A) A stand of trees with moderate to high canopy closure (60 to 80%); a multi-layered, multi-species

canopy dominated by large overstory trees (greater than 30 inches in diameter at breast height); a high incidence of large trees with various deformities (e.g., large cavities, broken tops, and other evidence of decadence); numerous large snags; large accumulations of fallen trees and other woody debris on the ground; and sufficient open space below the canopy for owls to fly; or

(B) In the absence of habitat which exhibits all the characteristics listed above, the available forested habitat which comes closest to approximating the listed conditions.

(b) Stands which do not exhibit at least two of the characteristics listed in paragraph (a)(A) of this section are not suitable habitat.

(4) (For information only) Federal law prohibits a person from taking northern spotted owls. Taking under the federal law may include significant alteration of owl habitat on any class of land ownership. Compliance with subsection (1) of this rule is not in lieu of compliance with any federal requirements related to the federal Endangered Species Act.

(5) Exceptions to the requirements for protecting northern spotted owl nesting sites are allowed if the operator is in compliance with, and has on file with the State Forester, an applicable incidental take permit issued by federal authorities under the Endangered Species Act.

Stat. Auth.: ORS 527.710

Stats. Implemented: ORS 527.674 & 527.715

Hist.: FB 11-1990(Temp), f. 12-20-89, cert. ef. 12-21-90; FB 5-1991, f. & cert. ef. 6-6-91; FB 9-1996, f. 12-2-96, cert. ef. 1-1-97, Renumbered from 629-024-0809; DOF 6-2005 (Temp), f. & cert. ef. 8-2-05 thru 1-27-06; DOF 6-2005 (Temp),. f. & cert. ef. 8-2-05 thru 1-27-06; DOF 8-2005, f. 12-13-05, cert. ef. 1-1-06

APPENDIX F

Oregon Administrative Rule 629-680-0000 (2002)

Purpose

(1) OAR 629-680-0000 to 0430 shall be known as the Resource Site Inventory and Protection Process Rules.

(2) The purpose of the rules in OAR 629, Division 680 is to set criteria to inventory and protect special resources described in ORS 527.710(3)(a) on forestlands regulated by the Forest Practices Act. Forests make a vital contribution to Oregon by providing jobs, products, tax base and other social and economic benefits, by helping to maintain forest tree species, soil, air and water resources and by providing a habitat for wildlife and aquatic life. Consistent with ORS 527.630, it is the policy of these rules to encourage economically efficient forest practices that assure the continuous growing and harvesting of forest tree species and the maintenance of forestland for such purposes as the leading use on privately owned land, consistent with sound management of soil, air, water and fish and wildlife resources that assures the continuous benefits of those resources for future generations of Oregonians.

Stat. Auth.: ORS 527.710

Stats. Implemented: ORS 527.715

Hist.: FB 4-1990, f. & cert. ef. 7-25-90; FB 3-1991, f. & cert. ef. 5-23-91; FB 9-1996, f. 12-2-96, cert. ef. 1-1-97, Renumbered from 629-056-0010

APPENDIX G

Oregon Administrative Rule 629-680-0010 (2002)

Definitions

In addition to the definitions listed in OAR 629-600-0100, as used in OAR 629, division 680:

(1) "Critical period of use" means the time of year the State Forester determines a species is sensitive to disturbance at a resource site.

(2) "Disturbance" means actions which cause birds to flush from the resource site.

(3) "Endangered species" means any fish or wildlife species identified as "endangered" on lists that are adopted, by rule, by the Oregon Fish and Wildlife Commission or are federally listed as "endangered" under the Endangered Species Act of 1973 as amended.

(4) "Listed species" means a species adopted by the Board under OAR 629-680-0200.

(5) "Site productivity" means the ability of a resource site to produce the benefits for which it is being protected. As an example, nesting site productivity is measured by the number of young birds successfully raised. For a roosting site, productivity is measured by the number of birds roosting over a given time. Watering site productivity is measured by the number of band-tailed pigeons that visit the resource site over a given time.

(6) "Threatened species" means any fish or wildlife species identified as "threatened" on lists that are adopted, by rule, by the Oregon Fish and Wildlife Commission or are federally listed as "threatened" under the Endangered Species Act of 1973 as amended.

Stat. Auth.: ORS 527.710

Stats. Implemented: ORS 527.715

Hist.: FB 4-1990, f. & cert. ef. 7-25-90; FB 3-1991, f. & cert. ef. 5-23-91; FB 8-1991, f. & cert. ef. 10-30-91; FB 9-1996, f. 12-2-96, cert. ef. 1-1-97, Renumbered from 629-056-0020

APPENDIX H

Oregon Administrative Rule 629-680-0100

Process for Board Evaluation of Threatened and Endangered Fish and Wildlife Species that Use Resource Sites that Are Sensitive to Forest Practices

(1) When a species is listed as threatened or endangered by state or federal authorities, the Board shall adopt rules to protect resource sites that are used by those species and that are sensitive to forest practices. The following process shall be used when the Board develops protection rules for these resource sites:

(a) The Board's evaluation shall be based on the best available information summarized in a technical review paper. The paper must be submitted by those proposing protection for resource sites used by a threatened or endangered species. The paper may be written by the State Forester, another agency, an organization or a person. The paper shall demonstrate how the resource sites are sensitive to forest practices. The paper may rely upon information used during the listing process and must:

(A) Identify the resource sites used by the species;

(B) Identify forest practices that conflict with the resource sites;

(C) Evaluate the biological consequences of the identified conflicts; and

(D) Propose protection requirements and exceptions for the resource sites.

(b) The State Forester shall review the technical paper submitted under subsection (1)(a) of this rule. The review shall include an evaluation of the literature used, consultation with technical experts and a technical

review by experts chosen by the State Forester. The State Forester shall submit a report of this review to the Board.

(c) The Board shall review and accept or reject the information presented in subsections (1)(a) and (b) of this rule;

(d) Using the technical review paper and the State Forester's report, plus other available information for the species, the Board shall:

(A) Identify the resource sites for the species;

(B) Identify forest practices that conflict with the resource sites and evaluate the consequences of those conflicts;

(C) Determine the protection requirements for the resource sites; and

(D) Determine any exceptions criteria.

(2) The Board shall adopt protection requirements and exception criteria for resource sites used by the threatened or endangered species.

(3) The State Forester shall maintain an inventory of protected resource sites that are used by threatened or endangered species.

(4) When a threatened or endangered species is delisted by the Oregon Fish and Wildlife Commission or the U.S. Fish and Wildlife Service, the Board shall determine whether continued protection of resource sites is warranted:

(a) If the Board determines that continued protection rules are warranted, the rules shall be promulgated under the appropriate statutory authority;

(b) If the Board determines that continued protection rules are not warranted, existing rules shall be repealed.

Stat. Auth.: ORS 527.710

Stats. Implemented: ORS 527.715

Hist.: FB 4-1991, f. & cert. ef. 5-23-91; FB 9-1996, f. 12-2-96, cert. ef. 1-1-97, Renumbered from 629-056-0100

APPENDIX I

Oregon Administrative Rule 629-680-0220

Process for Determining Forest Practices Conflicts and Consequences; Protection Requirements for the Resource Site

(1) The following process shall be used by the Board to evaluate forest practices conflicts and consequences and in setting appropriate protection for the resource site. Using the technical review paper developed in OAR 629-680-0200, plus other available information for each listed species, the Board shall:

(a) Identify the resource site for each listed species;

(b) Identify forest practices that conflict with the resource site and evaluate the consequences of those conflicts;

(c) Determine the protection requirements necessary to protect the resource site;

(d) Determine any exceptions criteria.

(2) The Board shall adopt protection requirements and exception criteria for each species listed in OAR 629-665-0100.

Stat. Auth.: ORS 527.710

Stats. Implemented: ORS 527.715

Hist.: FB 4-1990, f. & cert. ef. 7-25-90; FB 9-1996, f. 12-2-96, cert. ef. 1-1-97, Renumbered from 629-056-022

APPENDIX J

STATE OF OREGON

HEARING DECISION

ALVIN & MARSHA SEIBER
C/O PHILLIP D. CHADSEY
900 SW 5TH AVE STE 2300
PORTLAND OR 97204 1232
PHILLIP D. CHADSEY,
ATTORNEY
900 SW FIFTH AVE STE 2300
PORTLAND OR 97204 1232

DEPARTMENT OF FORESTRY
FOREST PRACTICES DIVISION
2600 STATE ST
SALEM, OR 97310 1336
RICHARD WHITMAN
ASSISTANT ATTORNEY
GENERAL
1162 COURT ST NE
SALEM OR 97310 1320

* * * *

The following HEARING DECISION was served to the parties at their respective addresses.

* * * *

BEFORE THE BOARD OF FORESTRY
OF THE STATE OF OREGON

FINAL ORDER
Notification 98-791-40082

In the Matter of the Denial of a Written Plan submitted
by Alvin and Marsha Seiber

History of the Case: A written plan to conduct a forest operation was submitted to the State Forester, Oregon Department of Forestry, on February 4, 1998. On February 19, 1998, the State Forester, through his authorized representative, denied the plan, indicating it was in conflict with OAR 629-665-210(1), because it failed to address how the operation would provide for a 70 acre area of suitable spotted owl habitat. The Order further provided that excep-

tions to the protection of the nesting site may be approved if the operator obtained an incidental take permit from the federal authorities under the Endangered Species Act. On February 25, 1998, the landowners, through counsel, submitted a "Notice of Appeal", setting forth the reason for the appeal. A hearing was to be conducted on March 12, 1998, in Salem, Oregon. A Notice of Hearing was mailed setting that date. On March 12, 1998, a pre-hearing conference was conducted with Phil Chadsey, counsel for the landowner, and Richard Whitman and Celeste Doyle of the office of the Attorney General. A hearing was set for March 23, 1998, at which time parties were informed of their opportunity to present evidence and witnesses.

On March 23, 1998, a hearing was conducted in Salem, Oregon. The same aforementioned attorneys appeared. Mr. Whitman presented documents and witnesses. Mr. Chadsey failed to present any evidence or witnesses, but did make objections to evidence and question the witnesses presented by the Department of Forestry. The record closed. After that time, the Assistant Attorney General submitted a closing memorandum. It was not considered in the issuance of this final order, as the record had closed, and there had been no indication at the time of the hearing that the State wished to submit additional briefs.

Legal Issue: Should the written plan submitted February 4, 1998, have been denied under OAR 629-665-210?

Findings of Fact (1) Alvin and Marsha Seiber own 196.19 acres of land located in Section 8, Township 14 South, Range 2, East, W.M., in Linn County, Oregon. (2) The County assessor valued the property at a real market value of $369,570 for the 1997 tax year, with $167,700 attributed to improvements. (3) The Seibers live on the subject property, in the "improvement", their home, which was built in 1988. There is also an out-building and an old bar in disrepair. (4) The property has an open range designation, which would

allow livestock grazing. (5) The property abutting the subject property is owned by a timber company. (6) In 1990, the federal government listed the Northern Spotted Owl as an endangered and protected species. (7) The timber company began surveying the property for the Northern Spotted Owl in 1991. (8) In 1991, a pair of Northern Spotted Owls were banded, and there were over a dozen "responses" by the owls that spring and summer. (9) In 1992, there were four "responses" from the pair, which had been identified as the Little Wiley pair.

(10) Nesting behavior was observed and the activity center of the pair was located. (11) In 1993, the pair provided five responses. (12) In 1994, the pair showed signs of nesting, and the center of activity was moved from the previous location. (13) In 1995, although the pair was sighted, there was no apparent nesting activity. (14) In 1996, the pair was sighted only once, and again did not exhibit nesting behavior. (15) In 1997, no responses were obtained from the pair. (16) Sightings usually occur in the spring and summer months.

(17) In January, 1996, a Notification of Operation near the Little Wiley nesting site was received by the Oregon Department of Forestry, to log the Seiber's land. (18) The nesting site was located near the land ownership boundary between the Seibers and the timber company. (19) After reviewing the sighting records, and meeting with the property owners, a 70-acre area of suitable owl habitat was marked. That area had the appropriate characteristics for habitat. (20) The US Fish and Wildlife Service had developed guidelines for reducing the risk of harm to the species, by suggesting that at least 70 acres of the best available suitable habitat encompassing the activity center be protected. (21) Critical nesting periods for the species are between March 1, and September 30, of each year. (22) In January, 1996, the Department met with both of the subject landowners, and

established a 70-acre area surrounding the activity center, listing that site as a protected resource area. (23) The Seibers owned 41 of the subject acres. (24) The stand contained predominately Douglas fir and western hemlock, with lesser amounts of other species. (25) It has an appropriate canopy closure and sufficient open air space below the canopy, but there are fewer over story trees or snags to be considered optimal for spotted owl habitat. (26) Owls in poor habitat nest only once every five years, while optimum conditions allow nesting four out of five years. (27) In 1994, the Seibers logged four acres. (28) In 1996 the Seibers submitted a Notification of Operation which included a written-plan to protect the spotted owl site, which was approved. They harvested 10 acres of the property. (29) On February 4 1998, Jerry Whaley, submitted a Notification of Operation to conduct a logging operation September 1, 1998, to log the 41 acres contained in the resource area.

(30) The operation was not allowed to commence until a written plan was submitted addressing both the resource site and the fish bear streams. (31) The plan called for clear cutting the 41 acres. (32) The Seibers were identified as both the land owners and the timber owners, and there is no evidence that they have entered into any contracts to sell the timber. (32) A "written plan" was submitted, addressing the fish bearing streams. (33) The plan also indicated that, "No operatations (sic) will be conducted during the critical period of use March 1 to September 1998 or until the young owls fledge whichever date occurs first. Because the Seibers will not log in the area while the spotted owls are present, none of the owls will be harassed, harmed, taken or killed in violation of any state or federal law." (34) On February 19, 1998, the State Forester denied the written plan submitted on February 4, 1998 because it was in conflict with the protection of the Northern spotted Owl nesting site, and does not address how the operation would be conducted to provide for a 70-acre area of suitable spotted owl habitat. (35) The Order

also provided that "exceptions to protection of the northern Spotted Owl nesting site may only be approved by the State forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act. (36) The landowners have not applied for an incidental take permit.

(37) If the owls are not found to be in the nesting site for three consecutive years, the Department of Forestry will remove no longer carry that site on its "protected resource" site list. (38) If the owls are found to be nesting in another area, the Department of Forestry will immediately remove the "protected resource" classification from the site.

(39) The Seibers have another 85 acres of "forested" property on their parcel. (40) On February 25, 1998, the State Forester was sent a notice of appeal from the attorney for Marsha and Alvin Seiber, stating that the Seibers are willing not to have the timber logged during the nesting season, if northern spotted owl are present in the core area this summer, but that once the season is over they want to log the timber within the core area. (41) The letter continued, "They are tired of the State of Oregon using their property as a public wildlife reserve to their detriment. The Seibers are retired and they need the income from their timber in order to enjoy their retirement. As you are aware a unanimous jury in the case of *Boise Cascade Corp. v. State of Oregon*, Clatsop County Circuit Court No. 93-2018, found that the subject regulation required timber owners within a 70-acre nesting site to submit to a physical occupation of their property entitling them to just compensation under the Fifth Amendment to the US Constitution, for the loss of use of their timber. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419, 102 S. Ct 3164, 73 L ED 2nd 868 (1982)." "The court also found that the regulation works a taking because a property owner is denied all economic productive use of the timber that cannot be logged. *Lucas v. South Carolina*, 505 US 1003, 112 S Ct

2886,120 L Ed 2nd 798 (1992). Under the rules of issue preclusion (collaterel estoppel), those findings by the court and jury will be binding in any future litigation brought by property owners against the State seeking compensation on account of being barred from logging because of OAR 629-665-0210. *State Farm Fire & Cas v. Reuter*, 299 Or 155, 158-59, 700 P2d 236 (1985). A regulation that works a taking under the Fifth Amendment is also void and unenforceable under Oregon law. *GTE Northwest, Inc. v. Public Utility Commission*, 3211 Or 458, 900 P2d 495 (1995). The Oregon Department of Forestry should consider this letter to be notice under ORCP 32(H(1)(b) as a demand that the Board of Forestry withdraw the foregoing regulation within the next 30 days. If it does not, my clients waive any hearing before the BOF and request that it issue a final order in this matter as soon as possible".

(42) Mr. Chadsey was sent a Notice of Hearing, with a Notice of Contested Case Rights and Procedures, and by letter dated March 6, 1998, he indicated that he was willing to waive a right to a hearing so that a final order could be entered by the Board at the next meeting. (43) On March 11, 1998, Mr. Chadsey wrote to the Assistant Attorney General indicating that his clients admit that they have not complied with the requirements of the administrative rule by failing to address how the 70-acre core area will be protected. He suggested it would be a waste of time to hold a hearing, and argued that only a court has the authority to hear the Seiber's federal constitutional takings claims. He further stated that it would violate their right to due process to have the Board of Forestry consider whether its own conduct in a prior proceeding, which both a court and jury have found to have been unconstitutional, is binding upon it in this proceeding based on the ex parte legal advice form counsel that is also representing the Department of Forestry. *Morgan v. United States*, 304 US 1, 58 S Ct 773, 82 L Ed 1129 (1938). (44) On March 11, 1998, he was sent documents which would be

offered by the Attorney General's office at the hearing. (45) On March 13, 1998, the Board of Forestry delegated the authority to issue a final order to the Administrative Law Judge in this case.

DISCUSSION

Jurisdiction

Counsel for the landowners makes a variety of arguments, in an apparent attempt to avoid the takings issue being resolved by the Board, or this Administrative Law Judge. First, there was argument that because this administrative law judge (ALJ) presided over one of the Boise Cascade administrative hearings, she is somehow prejudiced in this case. Mr. Chadsey argues that the ALJ was reversed, and this would somehow bias her. He was offered an opportunity to provide any specific evidence of bias. Furthermore, he has failed to demonstrate how a decision in a previous case, which involved a different landowner, and which did not address the issue of whether a "taking" had occurred. In fact, both the Court of Appeals and the Oregon Supreme Court affirmed the Board determinations issued in Boise Cascade. See *Boise Cascade Corporation v. Board of Forestry*, 325 Or 203, ___ P2d ___ (1997). Because he has failed to demonstrate any bias on the part of the fact finder, his objections are without merit.

Mr. Chadsey argues that the issue of a taking has not been raised, and is not properly before this tribunal. His argument is not consistent with his prior pleadings. He requested a hearing specifically alleging that there was issue preclusion preventing the Department from asserting that there was no taking. In that request for hearing, Mr. Chadsey placed the constitutional issues squarely in this forum. He cannot now characterize his request for appeal as anything other than what it is, a direct challenge on the validity of the regulation. His challenge clearly is on a constitutional basis, based on

both the cases he cited, and the clear meaning of his words. Based on the arguments presented by Mr. Chadsey, both the state and federal constitutional challenges have been proffered. OAR 629-55-110 which provides for the procedure in requesting a hearing from a denial of a written plan provides that the request for hearing must include a "specific statement as to the reasons for disputing the State Forester's order, including but not limited to disagreement with any findings leading to the order. In addition, the request for hearing shall state what relief from the order is sought". In this case, Mr. Chadsey apparently sought rescission of the administrative rule. He argues that the rule causes an unconstitutional taking, and implies that it must therefore be withdrawn. The issue is ripe for adjudication.

Counsel also argues that this forum has no jurisdiction to consider the federal takings issues on two grounds. Firstly, he contends that the circuit court case precludes the Department from asserting that the rule is constitutional. It must be noted that although this argument was raised, neither party to this proceeding provided any evidence of the findings made, or the final results reached in the Boise Cascade case. A Circuit Court determination is not a decision of record. Additionally, it cannot be assumed that the interpretation given by any attorney is necessary shared by others, the burden is on the party asserting collateral estoppel to prove the elements. The correct procedure would be to place into evidence the prior judgment and the appropriate portions of the record. See *Koos v. Roth*, 43 Or App 383, 602 P2d 1128 (1979). Without such evidence, the arguments averred by counsel about collateral estoppel are unsupported.

However, even if there was evidence of the trial court ruling, it would not necessarily preclude this adjudication. A rule can be found to be invalid as it is applied to a particular set of circumstances, while generally a valid exercise of the state's police power. In *United States v. Mendoza*, 464 US 154, 104

S Ct 568 (1984) the United States Supreme Court did not allow collateral estoppel to be applied against the federal government where a Filipino national had been denied the right naturalization. In that case, the petitioner had argued that others under similar circumstances had been granted naturalization by the U.S. District Court upon a finding that the Government had not provided sufficient justification for failing to station an INS representative in the Philippines during all of the relevant periods. The Court discussed in length the difference between suits involving the government and those between private parties, and held that, at least in the federal context, nonmutual offensive collateral estoppel simply does not apply against the Government in such a way as to preclude relitigation of issues. In *Norgard v. Rawlinson*, 30 Or App 999, 569 P2d 49 (1977), the Court of Appeals refused to allow this "offensive collateral estoppel" by a nonparty to the first proceeding, by explaining that the "existence of over 30 circuit courts in this state made it a practical impossibility for the [Worker's Compensation] Board to be bound by any particular decision of a circuit court." The analysis in Norgard is applicable here. Any determination by a circuit court about whether there was a taking would clearly be fact specific. It cannot be applied to another case, involving another property, or other parties. Issue preclusion is not applicable in this case.

Counsel then argues that this forum has no jurisdiction to address the takings issue. In *Boise Cascade*, 325 Or 185, ___ P2d ___ (1997), the landowners had been denied a written plan because of its failure to address the northern spotted owl resource site on the property. At the two separate administrative hearings related to separate parcels, the landowner had raised the issue of whether there had been a taking, under both state and federal constitutional law. The Board of Forestry rejected the argument stating that the landowner failed to present evidence of any taking at the one hearing. At the second hearing, the issue of a "taking" was deferred.

Subsequently, the landowner filed an inverse condemnation action in Clatsop County Circuit Court, alleging a "taking" under both the Oregon Constitution and the United States Constitution. The State moved for dismissal of those actions, and the matter came to the Oregon Supreme Court on the issue of whether the case should have been dismissed for lack of jurisdiction. The State had argued that the Board of Forestry had primary jurisdiction to make a determination in the matter. The Oregon Supreme Court held that the circuit court was not precluded from exercising jurisdiction. However, in its companion case, at 325 Or 203, the Court concluded that the Board has jurisdiction to make a determination as to whether a "taking" had been effected. The Board and the Circuit Court have concurrent jurisdiction to decide "takings" issues.

In *Dodd v. Hood River County*, ___ F3d ___; 1998 WL 57497 (9th Cir 1998), the Ninth Circuit Court of Appeals addressed zoning regulations and the "takings" clause. In that case, the Dodd's purchased forest land property with the hope to build a homesite. At the time, state law limited whether a dwelling could be placed on the property, but the county ordinances were not in compatible with the state law, and might have allowed development at that time. After the property was purchased, the county passed ordinances to comply with the statewide goals. Several years later the landowners applied for permits to build a residence on the property. It was denied, and the Dodd's appealed to the Land Use Board of Appeals (LUBA), arguing a taking under only the Oregon Constitution. They specifically reserved their takings claim under the federal Constitution. LUBA concluded that there was no taking under the Oregon Constitution because the land could "produce a net profit if properly managed, and therefore, the Dodds were not denied a "substantial beneficial use of the property." That determination was affirmed by the Court of Appeals and the Oregon Supreme Court. The Dodd's then filed suit in federal court.

The State argued that the issue of whether there was a substantial beneficial use of the property had been previously litigated, and could not be relitigated in the federal forum. The Ninth Circuit concluded that the Dodds had a full and fair opportunity to present all relevant evidence at the first hearing, and their failure to avail themselves of that opportunity should not allow them to have a "second bite at the apple." The analysis used in the Oregon forums was the same as used in U.S. Supreme Court cases, under *Lucas v. South Carolina Coastal Council*, 505 US 1003, 112 S Ct. 2886 (1992).

Implicit in the discussion in Dodd is the proposition that a state agency has the authority to rule on federal constitutional questions. Clearly, an agency has the authority to invalidate one of its own rules on Constitutional grounds. That is precisely the remedy sought by these landowners. Both the Oregon Courts and the Ninth Circuit agree with that proposition. The Board has the authority to rule on both state and federal constitutional issues, including the issue of whether there has been a taking.

Finally, there is an assertion that under *Morgan v. United States*, 304 U.S. 1, 58 S. Ct 773 (1938), there is some failure of due process in having the Board of Forestry issue a determination in this case. In *Morgan*, the Secretary of Agriculture fixed maximum rates to be charged by market agencies at the Kansas City Stockyards. Challenges to the Department's authority were made. The Secretary of Agriculture had signed findings made by the Bureau of Animal Industry after a hearing had been conducted. Exhibits were received and oral evidence and argument heard. The appellants had requested an opportunity to submit exceptions and argument to the Secretary, but the request was refused. The Court stated that the right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them.

No such opportunity had been provided to the appellants in Morgan, as the government had failed to present sufficient information as to its position to allow for a reasoned response.

Morgan has no application here. Counsel for the landowners asked for an opportunity to see the Department of Forestry's legal arguments prior to the hearing. Arrangement were made to accommodate this. At the hearing, they were given the opportunity to submit additional briefing on any issues raised at that time. Despite these opportunities, the landowners opted not to submit further argument, or to even provide any evidence. The performance of a quasi-judicial function by an administrative agency is of the highest importance, and does not cripple or embarrass the exercise of its authority. It is in the agency's own interest to ensure a full and fair hearing. That has been done in this case. The landowners' refusal to avail themselves of the opportunity does not make an otherwise fair process unfair.

Application of Rules

ORS 527.710 requires that the Board of Forestry adopt rules establishing forest practice standards throughout the state, assuring the continuous growing and harvesting of forest tree species, and providing for the overall maintenance of fish and wildlife. The statute also requires the board to establish inventories of resource sites needing protection, including species listed under the Endangered Species Act of 1973, as amended and sensitive bird nesting sites. The board is required to adopt rules appropriate to protecting the resource sites in the inventories.

Pursuant to the legislative mandate, the Board of Forestry has adopted administrative rules. OAR 629-605-0150 requires an operator, landowner or timber owner to notify the State Forester at least 15 days before commencing an operation. OAR 629-605-1070 requires that the operator, landowner or

timber owner submit a written plan prior to conducting an operation if the operation is within 100 feet of fish-bearing stream, or within 300 feet of any nesting or roosting site of a threatened or endangered species. OAR 629-605-0180(1)(c) provides:

> If planned forest practices are determined to conflict with protection of the sensitive resource site, the written plan shall describe reasonable measures sufficient to resolve the conflict in favor of the resource site. Reasonable measures to resolve the conflict in favor of the resource site may include but are not limited to preparing and implementing a habitat management plan, limiting the timing of forest practices, redesigning the proposed practices in favor of site protection and excluding the forest activities outright.

OAR 629-665-0210 provides, in part

(1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl, the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:

> (a) A 70 acre area of suitable spotted owl habitat encompassing the next site, to be maintained as suitable spotted owl habitat.
>
> (b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site. Such disturbances must be prevented during the critical period of use for nesting. The critical period of use is the time period between March 1, and September 30, each year.

(2) For purposes of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest

or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State Forester to have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding. Such determination must be supported by repeated observation of the owls in close proximity or observation of nesting behavior.

(3)(a) For purposes of this rule, suitable spotted owl habitat means and includes:

> (A) A stand of trees with moderate to high canopy closure (60 to 80%); a multi-layered, multi-species canopy dominated by large overstory trees; a high incidence of large trees with various deformities; numerous large snags; large accumulations of fallen trees and other woody debris on the ground; and sufficient open space below the canopy for owls to fly; or
>
> (B) In the absence of habitat which exhibits all the characteristics listed above, the available forested habitat which comes closest to approximately the listed conditions.
>
> (b) Stands which do not exhibit at least two of the characteristics listed paragraph (a)(A) of this section are not suitable habitat. . . . . .

(5) Exceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the state Forester if the operator has obtained an incidental take permit from the federal authorities under the federal Endangered Species Act.

The Seibers submitted a notification to operate in an area which had been determined to be a protected resource because of the northern spotted owl pair sighted in that area since the beginning of surveying for such species. The area designated as the resource site exhibits at least two of the

characteristics listed in the administrative rule. The landowners failed to provide for any protection of the resource site, except they agreed not to log the area during the nesting season. They do not contest the accuracy of the characterization of the site. The State has presented evidence to support the finding that there have been northern spotted owls nesting on the site, and that the designated 70 acre area is appropriate for protecting the resource. The landowners have failed to seek an exception under the administrative rule. Clearly, the agency acted appropriate under its own rules in denying the written plan.

Taking—Federal

The Fifth Amendment of the Constitution of the United States provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation"

Counsel for the landowners in this case have failed to make any bona fide effort to present evidence as to whether there has been a taking; whether the alleged taking is one of real or personal property; whether this "taking" would be one which is considered a "physical invasion"; or whether it is their contention that there is no value to the land with the regulation imposed by the State.

In fact, they have refused to avail themselves of any of the opportunities for a fair hearing on those issues because they argue that the Board lacks the authority to rule on the issues. As has been discussed above, the Board has authority to address the issues, and they have been fully raised in this forum.

It would appear that the "strategy" of the landowner is to prevent a full and fair inquiry at this level, so there would not be a foreclosure of some future right to litigate.

However, having raised the issue; and given the *opportunity* to present both testimony and legal argument, the landowner is entitled to a determination as to whether there has been a taking. The landowner has requested an appeal of the denial of the written plan. If they did not wish to have a hearing, they could have allowed the denial to stand with appealing it, or they could have withdrawn the appeal. They did neither because to do either would have been a failure to exhaust administrative remedies, and probably bar further actions in other forums.

In the Notice of Appeal, the landowners cited two U.S. Supreme Court cases, *Loretto* and *Lucas*, both cited above. *Loretto* related to a permanent physical occupation of property, and the Court held that even a small permanent occupation was a per se "taking", and required just compensation. In *Lucas*, the Court held that where the State seeks to sustain regulation that deprives land of all economically beneficial use, it must pay just compensation. "While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking". Citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S Ct 158 (1922). In *Lucas*, the Court held that the Fifth Amendment is violated when land-use regulation does not substantially advance legitimate state interests, or denies an owner economically viable use of his land. In that case, a landowner, who had purchased two parcels of beachfront property was denied any right to erect a habitable structure on the property, when the land use laws changed to prohibit building on land so close to the beach "erosion zone". The state trial court found that this prohibition rendered the parcels "valueless".

Clearly, the case at hand is not in the nature of a physical occupation of the property. The State has no interest in having use of the property. They simply wish to limit the uses of the 41 acres *so long as* there is evidence of northern spotted owls using the area for nesting. The government

effects a physical taking only where it requires the landowner to submit to physical occupation of his land. *Yee v. City of Escondido, Cal*, 503 U.S. 519, 112 S. Ct 1522 (1992). As a factual matter, this landowner loses neither the right to possess nor to convey the affected areas. They are permitted to use the property in any way which does not disturb the owl's habitat, and that limitation will only continue so long as the pair remain in that area. In fact, under these circumstances, the limitation could be lifted within months, if the owls are found to have created a new resource site through nesting activities. It could be lifted within a year, if there are no sightings of the pair during this critical period, and the next. It could be lifted if the landowners were to obtain an incidental taking permit from the federal government.

The U.S. Supreme Court has consistently held that the unit of property for purposes of determining whether a taking has occurred is the owner's full bundle of property rights. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646 (1978). In that case, the Court said that, "the submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. . . . "taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."

The Seibers own 196 acres of land in one tax lot. That property contains other areas which can be harvested for timber, some buildings, including a homesite with substantial value. The fact that the denial of the written plan prevents the Seibers from pursuing *one* use of the property for a temporary, but indefinite, period of time, does not mean that it constitutes a taking. The entire property is to be considered. See *MacLeod v. County of Santa Clara*, 749 F.2d 541 (9th Cir. 1984). In *Goldblatt v. Town of Hempstead*, 369 U.S.

590, 82 S. Ct 987 (1962), a city ordinance prevented a landowner from excavating 20 of his 38 acre lot. The Court took into consideration the availability of the remaining 18 acres of land in determining that the ordinance did not constitute a taking. The landowners retain the right to enjoy the property, as well as any appreciation which might occur; to sell the timber rights, subject to the state and federal protections, to continue to hold this property as an investment, and to use the property for a variety of otherwise acceptable purposes. There was no evidence presented that the property has been made "valueless", by this denial, as required in *Lucas*. In fact, the landowners refused to provide any evidence whatsoever, and objected to the admission of evidence related to the property as irrelevant. Because of this, it cannot be contended that they have raised an argument that there has been any diminution of value. [although diminution of value, standing alone, cannot establish a taking. See *Penn Central*, supra, and *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114 (1926)]

In *Florida Game and Fish Com'n v. Flotilla*, 636 So.2d 761, (Fla App. 2 Dist 1994), a developer brought a per se *Loretto* claim when a Florida state regulation prohibited further development within 750 feet of a bald eagle nesting tree. The Court found no physical occupation and no taking. In that case, the landowner held 173 acres, and had been developing it in phases. A trial court found that 48 acres had been "taken" for habitat preserve. The appellate court reversed this, finding no taking simply because those 48 acres were subject to regulation. The property *as a whole* retained an economic life. The trial court had found that the Commission had "empowered the eagles to decide which land would be taken". The court held that the government neither owns nor controls the migration of the wildlife species it protects. Rather, the government merely employs it police power to "conserve and protect these species as a natural resource". Unwanted occupation of wildlife on private land may dimin-

ish the value of the property, but does not constitute a "taking". See *Christy v. Hodel*, 857 F.2d 1324.

The landowner has failed to show that under any federal analysis the denial of the written plan was a "taking".

Taking—State

The Oregon Constitution, Article I, Section 18 provides "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor except in the case of the state, without such compensation first assessed and tendered."

Government action may result in a "taking" under the Oregon Constitution when the governmental action creates an expectation that the private land in question will eventually be taken for public use. See *Fifth Avenue Corp. v. Washington Co.*, 282 Or 591, 581 P2d 50 (1978). The property owner, under such circumstances must show that the landowner is precluded from "all economically feasible private uses pending the eventual taking for public use, or that the designation resulting in such an intrusion as to inflict virtually irreversible damage. This test is not applicable here. There is no "expectation" that the State will take the property, either the land or the timber, for its own use.

A second type of "taking" occurs when the government action deprives the owner of all substantial beneficial or economically viable use of the property. *Lardy v Washington County*, 122 Or App 361, 857 P2d 885, rev den 318 Or 246 (1993). No particular denial of an application for a use demonstrates the loss of all economic use. The fact that one use is impermissible under a regulation does not necessarily mean that other economically productive uses are also precluded. Additionally, until alternative uses are applied for or attempted, there can be no conclusive authoritative determination of what is legally permitted by the regulations. The Seiber's vehement refusal to apply for an incidental take

permit, or to consider other uses of the land makes their claim of a "taking" fail.

There is no evidence as to what the landowners intended to do with the property, or when or how they acquired it. However, assuming that it was originally intended as an investment, it would be inappropriate to find a taking. Investments are made with the knowledge of governmental power to make laws for its conduct, and the balancing of regulatory goals against their economic consequences is the daily stuff of politics rather than of litigation for "just compensation". See *Suess Builders, v. City of Beaverton*, 294 Or 254, 656 P2d 306 (1982).

In *Dodd v. Hood River County*, 317 Or 172, 855 P2d 608 (1993), the Oregon Supreme Court applied the test as set out in *Lucas*, supra. The court applied a standard equivalent to Lucas, in that it looked at whether the landowner had "some substantial beneficial use of the property". See also, *Dolan v. City of Tigard*, 317 Or 110, 854 P2d 437 (1993). As discussed above, the entire bundle would have to be considered. In this case, the landowner has failed to show that there is no remaining value to the 196 acre parcel. In fact, the evidence shows that there is considerable value as a homesite, and for other purposes.

At the hearing, counsel for the landowner indicated that he believed *Dunn v. City of Redmond*, 303 Or 201, 735 P2d 609 (1987) precludes the Board from acting in this case. In Dunn had claimed that city ordinances were invalid under both the Oregon and U.S. Constitutions. Mr. Dunn challenged the Land Use Board of Appeals determination.

The issue before the court was LUBA's jurisdiction. Under the enabling statutes, the board had the authority to reverse or remand land use decisions if it finds that a local government made an unconstitutional decision. The court held, that under the statutory scheme an individual could challenge the

constitutionality of a land use decision to LUBA if the goal were to have the ruling set aside. If the individual wished for compensation for the government's acts, jurisdiction would belong in Circuit Court. The Board of Forestry has no similar limitations on its authority. The Court found in *Boise*, supra, that the Board does have jurisdiction over such issues. The landowner's argument about the applicability of Dunn is without merit.

FINAL ORDER

The denial of the Seiber's written plan was appropriate under OAR 629-665-0230. Application of the rule do not cause a taking under either the U.S. or the Oregon Constitutions.

Wendy Lewis
Administrative Law Judge

Dated this 28th, day of March 1998

NOTICE: You are entitled to judicial review of this Final Order. Judicial review is by the Oregon Court of Appeals pursuant to the provisions of ORS 183.482. Judicial review may be obtained by filing a petition for review with the Office of the State Court Administrator, Supreme Court Building, Salem, Oregon 97310, within 60 days from the service of the final order.

In the event the Final Order is appealed to the Oregon Court of Appeals, a copy of the petition should be mailed to Hearings Section, Employment Department 875 Union Street NE, Salem, Oregon 97311, as a means of expediting the preparation of the record.

APPENDIX K

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LINN

No. 01-0333

MARSHA SEIBER and ALVIN SEIBER,
Plaintiffs,

v.

STATE OF OREGON, by and through
THE OREGON STATE BOARD OF FORESTRY,
Defendant.

SECOND AMENDED COMPLAINT (For Declaratory Relief and Inverse Condemnation Action for a Temporary Regulatory Taking of Private Property for a Public Purpose)

Plaintiffs allege as follows:

INTRODUCTION

1.

Plaintiffs Marsha Seiber and Alvin Seiber (the "Seibers") are the owners of approximately 200 acres of property (the "Property") located in Linn County, which plaintiff Marsha Seiber acquired through inheritance in 1986. About 185 to 190 acres of the Property are commercial timberlands.

2.

In August 1990, the Oregon State Forester (the "OSF") adopted an interim spotted owl policy precluding timber harvest within a 70-acre core area of the best available suitable habitat in the vicinity of the nest site. The Oregon State Board of Forestry (the "Board") subsequently adopted

former OAR 629-024-0809 (present OAR 629-665-0210), which requires protection of a 70-acre core area of suitable northern spotted owl habitat encompassing the nest site. That provision states in part:

> "(1) Whenever the State Forester determines that an operation will conflict with protection of a nesting site of the northern spotted owl (Strix occidentalis caurina), the operator must obtain the State Forester's approval of a written plan before commencing the operation. The written plan, at a minimum, must address how the operation will be conducted to provide for the following:
>
> > "(a) A 70 acre area of suitable spotted owl habitat encompassing the nest site, to be maintained as suitable spotted owl habitat;
> >
> > "(b) Prevention of disturbances resulting from operation activities which cause owls to flush from the nesting site. * * *
>
> "(2) For the purposes of this rule, nesting site means and includes the tree, when known, containing a spotted owl nest; or when not specifically known, includes an activity center of a pair of adult spotted owls. An activity center is a location determined by the State forester to have been reliably identified as being occupied by an adult pair of spotted owls, capable of breeding. * * *
>
> * * * * *
>
> "(5) Exceptions to the requirements for protecting northern spotted owl nesting sites may be approved by the State Forester if the operator has obtained an incidental take permit from federal authorities under the federal Endangered Species Act." OAR 629-665-0210.

FACTS GIVING RISE TO PLAINTIFFS' CLAIMS

3.

Timber of the kind found on the Property is considered by defendant to be suitable nesting habitat for spotted owls. In 1994, the OSF informed plaintiffs that in April of that year a pair of northern spotted owls ("Little Wiley Owls") was discovered nesting in timber on land immediately to the north of the Property. The OSF then designated approximately 40 acres (the "Subject Timber") of the Property as northern spotted owl nesting habitat pursuant to OAR 629-665-0210 and informed plaintiffs they would not be allowed to log that area, so long as the activity site remained active under Oregon law.

4.

In 1997, plaintiffs were informed by the OSF that the owls had not nested on the adjacent land during that year. On February 4, 1998, plaintiffs filed Notification No. 98-791-40082 giving notice to the OSF of their desire to log the Subject Timber. In seeking to log the Subject Timber, plaintiffs indicated they were willing to not conduct logging operations while spotted owls might be nesting in the area (March 1 through September) or until the young spotted owls had fledged, to avoid any incidental harm to them. Even though the owls had not nested in the area during 1997, plaintiffs' plan to log the Subject Timber was denied approval on February 19, 1998 on the ground that it failed to describe how the operation would be conducted to provide a 70-acre core area of suitable spotted owl habitat consistent with the requirements of OAR 629-665-0210(1)(a).

5.

Plaintiffs then made a timely appeal of the OSF's denial of their plan to log the Subject Timber to the Board. On or about March 27, 1998, the Board entered a final order that

affirmed the denial of plaintiffs' plan. The denial of plaintiffs' written plan by the Board was a final administrative action prohibiting plaintiffs from logging the Subject Timber.

6.

To obtain a waiver of 629-665-0210(1), pursuant to section (5) of that regulation, plaintiffs then submitted an application for an Incidental Take Permit ("ITP") to the U.S. Fish and Wildlife Service (the "USFWS"), after preparing a Habitat Conservation Plan ("HCP") as required by the federal Endangered Species Act ("ESA"). On November 9, 2000, the USFWS issued a Final Order, signed by the Regional Director denying plaintiffs an ITP for the Little Wiley Owls, even though they had not nested in the designated core area that includes the Subject Timber since 1996.

7.

After the USF&WS declined to issue plaintiffs an ITP, the State Forester on August 3, 2001 informed plaintiffs that he had declared the nesting site to have been abandoned and, therefore, the defendant withdrew its objections to their harvesting the Subject Timber.

CLAIM ONE
(Declaratory Relief—Facial Challenge to
OAR 629-665-0210)

8.

Plaintiffs reallege paragraph 1 through 7 above.

9.

Plaintiffs seek a declaratory judgment pursuant to ORS 28.010, *et seq.*, that OAR 629-665-0210 effects a taking of plaintiffs' property for a public purpose under the Fifth Amendment to the U.S. Constitution. Timber owners who are not permitted to log their timber on account of that rule are required to submit to a physical occupation of that

property for use as a spotted owl nesting site; at the same time, they are denied all economic productive use of timber that cannot be logged on account of being preserved as a nesting site. The Board lacks the power of eminent domain authority to obtain a "conservation easement" for the purpose of obtaining property to be maintained as suitable spotted owl habitat; therefore, it did not have the authority to promulgate OAR 629-665-0210 which imposes a wildlife servitude for that purpose. *GTE Northwest, Inc. v. Public Utility Commission*, 321 Or 458, 900 P2d 495 (1995).

CLAIM TWO
(Oregon Constitution)

10.

Plaintiffs reallege paragraphs 1 through 7 above.

11.

From April 1994 until August 2001 the 40 acres of Subject Timber that plaintiffs has been prohibited from logging contain approximately 800,000 board feet of merchantable timber, much of which was infested with root rot that caused many of the trees to fall down and to no longer be of merchantable quality. The market price of the merchantable timber also declined significantly from 1994 to 2001. As a result of not being able to harvest their timber during that period plaintiffs have suffered a loss of $467,462.00.

12.

The Board's denial of plaintiffs' plan to log the Subject Timber to preserve it as a spotted owl nest site and core area habitat constituted a taking of plaintiffs' property for a public purpose, which requires defendant to pay plaintiffs just compensation for the subject timber pursuant to Article I, section 18, of the Oregon Constitution.

13.

The Subject Timber that plaintiffs desire to log has no economic value unless harvested.

14.

The Board's action in denying plaintiffs the right to log the Subject Timber has denied plaintiffs of economically productive use of that property interest.

15.

Plaintiffs are entitled to interest at the rate of 9 percent from August 3, 2001 and their reasonable attorney fees, pursuant to ORS 20.085.

CLAIM THREE
COUNT ONE

(*Lucas* Per Se Claim—U.S. Constitution)

16.

Plaintiffs reallege paragraphs 1 through 7, 11, 13 and 14 above.

17.

The Board's action in denying plaintiffs the right to log their property deprived plaintiffs of all economically productive use of their merchantable timber and constituted a taking of plaintiffs' property for a public purpose, which requires defendant to pay plaintiffs just compensation for their property under the Takings Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution.

CLAIM THREE
COUNT TWO

(*Agins* Claim—U.S. Constitution)

18.

Plaintiffs reallege paragraphs 1 through 7, 11 and 13 above.

19.

In 1987 the Oregon legislature enacted a state Endangered Species Act. ORS 496.192(1), which is a part of that act, states that it is was not intended

> "to require an owner of any commercial forestland or other private land to take action to protect a threatened species or endangered species, or to impose additional requirements or restrictions on the use of private land."

20.

That same session of the legislature also adopted ORS 527.630(1), which provides, in part, that "it is declared to be the public policy of the State of Oregon to encourage economically efficient forest practices that ensure the continuous growing and harvesting of forest tree species and the maintenance of forestland for such purposes as the leading use on privately owned land. * * *"

21.

Defendant took no action to adopt what is now OAR 629-665-0210 or otherwise protect northern spotted owl habitat on private lands until the bird was declared a threatened species under the federal ESA in July 1990. OAR 629-665-0120 was adopted as a result of the USFWS adopting guidelines requiring the protection of a minimum of 70 acres of habitat around every northern spotted owl nest site.

22.

However, when the USFWS was required to designate critical habitat for the recovery of the species, it only designated lands owned by the federal government as critical habitat for the northern spotted owl. Further, the USFWS rescinded its 70-acre guideline as applying to private property after a federal court found that it had not been adopted according to law.

23.

OAR 629-665-0210 does not substantially advance a legitimate state interest because it singles out only some timber owners to bear the burden of providing nesting habitat for the spotted owl, while other timber owners in the same area are free to harvest their timber. Therefore, enforcement of OAR 629-665-0210 constitutes a taking of private property for a public purpose in violation of the Takings Clause of the Fifth Amendment to the U.S. Constitution.

CLAIM THREE
COUNT THREE

(Penn Central—U.S. Constitution)

24.

Plaintiffs reallege paragraphs 1 through 7, 11, 13, 19, 21 and 22 above.

25.

Pursuant to Oregon law, plaintiffs acquired and have managed their timberlands with the investment backed expectation that they could use them for the continuous growing and harvesting of forest tree species, in order to provide income during their retirement. The application of OAR 629-665-0210 to forty acres of their property prevents them from managing their property in accordance with their investment backed expectations and prevents them from realizing income

from the tree crop on those forty acres. Therefore, enforcement of OAR 629-665-0210 constitutes a taking of private property for a public purpose in violation of the Taking Clause of the Fifth Amendment to the U.S. Constitution.

Wherefore, plaintiffs pray that:

A. OAR 629-665-0210 be declared invalid because it takes private property for a public purpose;

B. The Seibers be awarded the sum of $467,462.00, together with interest thereon at the rate of 9 percent per annum from August 3, 2001; and

C. The court award plaintiffs their reasonable attorney fees and costs.

DATED: November 19, 2002.

STOEL RIVES LLP

s/s PHILLIP D. CHADSEY
Phillip D. Chadsey, OSB No. 66028

Attorneys for Plaintiffs
Trial Attorney: Phillip D. Chadsey

APPENDIX L

[SEAL] Oregon
John A. Kitzhaber M.D., Governor

General File
6-6-7

Department of Forestry
State Forester's Office
2600 State Street
Salem, OR 97310
(503) 945-7200
FAX (503) 945-7210
TTY (503) 945-7213/800-437-4490
http://www.odf.state.or.us

[SEAL] *"STEWARDSHIP IN FORESTRY"*

August 3, 2001

Alvin and Marsha Seiber
45277 Wiley Creek Drive
Sweet Home, Oregon 97386-9711

Dear Alvin and Marsha Seiber:

On January 2, 2001, the Department of Forestry sent you a letter which conditionally approved your written plan (notification no. 00-40689), which proposed harvesting approximately 40 acres of timber within a northern spotted owl "core area" previously designated in connection with timber operations on your land.

Approval of that written plan was subject to the condition that "commercial harvest operations can commence after March 15, 2001, anytime adequate observations are obtained by the State Forester indicating the Little Wiley northern

spotted owl nesting site is not occupied by a pair of spotted owls."

The State Forester has received information that documents that the so-called Little Wiley northern spotted owl nesting site, located near the northern boundary of your property, is no longer occupied by a pair of owls. The history of the Little Wiley northern spotted owl nesting site includes the following:

2001	No response
2000	Single male
1999	Single male
1998	No response
1997	No response

For the purposes of administering the Forest Practices Act and rules, a northern spotted owl nesting site remains "active" until certain criteria establish that the nest site is no longer occupied by a pair of spotted owls. One of those criteria is if five consecutive years of surveys indicate alternating or varying combinations of unoccupied status and resident single status. Therefore, the Little Wiley northern spotted owl nesting site can be considered to be no longer occupied by a pair of spotted owls, and the protection measures specified in Oregon Administrative Rule (OAR) 629-665-0210 are not required.

If you wish to conduct any type of forest operation, please contact Kevin Crowell, Forest Practices Forester, and submit a completed Notification of Operation. Kevin's telephone number is 503-367-6108.

Compliance with the Forest Practices rules does not guarantee compliance with the federal Endangered Species Act (ESA). Parties conducting operations are subject to all federal requirements as well as any requirements administered under the Forest Practices rules. Parties conducting operations are

encouraged to contact the U.S. Fish and Wildlife Service to obtain compliance with the ESA.

Sincerely,

/s/ ROD KRAHMER
for Scott Hayes
Forest Practices Operations Unit Manager

Cc: Phillip Chadsey, Stoel Rives LLP, Attorneys
Ian Whitlock, Department of Justice
Karen Moynahan, Department of Justice
Kevin Crowell, Linn District
Richard Szlemp, U.S. Fish and Wildlife Service
Charlie Stone, Department of Forestry
Gregg Cline, Department of Forestry
Rod Krahmer, Department of Forestry
Sandy Middleton, Department of Forestry

APPENDIX M

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LINN

No. 01-0333

MARSHA SEIBER and ALVIN SEIBER,
Plaintiffs,

v.

STATE OF OREGON, by and through
THE OREGON STATE BOARD OF FORESTRY,
Defendant.

JURY INTERROGATORIES

We the jury, find as follows:

Question 1: Were the plaintiffs denied all economically viable or productive use of the subject 40 acres of timber while the ban on harvesting it was in effect:

Yes √
No

Question 2: Did the subject regulation advance a legitimate state interest:

(a) In that regard, did it single out the plaintiffs to bear a burden that should be borne by the public as a whole?

Yes √
No

(b) Did it require plaintiffs to provide nesting habitat if they were not a cause of the spotted owl being listed as a species threatened with extinction?

Yes √

No

Question 3: When compared with the plaintiffs' right to make economic productive use of the property, including their reasonable investment-backed expectations, was it necessary for the State to prevent them from harvesting 40 acres of their timber for a period of seven years in order to ensure the survival of the spotted owl as a species?

Yes

No √

Question 4: What was the fair market value of the subject 40 acres of timber in January 1994?

$333,000

Question 5: What was the fair market value of the subject 40 acres of timber in August 2001?

$258,000

DATE: 11-6-03.

/s/ KEVIN BETHEL
Jury Foreperson

APPENDIX N

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LINN

No. 01-0333

MARSHA SEIBER and ALVIN SEIBER,
Plaintiffs,

v.

STATE OF OREGON, by and through
THE OREGON STATE BOARD OF FORESTRY,
Defendant.

GENERAL JUDGMENT AND MONEY AWARD

This case was tried to a 12-person jury November 3 through November 6, 2003 in Linn County Circuit Court, Circuit Court Daniel R. Murphy presiding. The case went to trial on Plaintiffs' Second Amended Complaint and the Defendant's Amended Answer to Second Amended Complaint with Affirmative Defenses and Counterclaim. Following trial, all claims in this case have been fully and finally adjudicated.

IT IS ADJUDGED:

1.

Plaintiff's First Claim for Relief (Declaratory Relief—Facial Challenge to OAR 629-665-0210) was dismissed on Defendant's Motion for Summary Judgment by letter rulings of April 24, 2002 and July 30, 2002, and it is hereby adjudged dismissed.

2.

Plaintiff's Second Claim for Relief (Takings" Claim under the Oregon Constitution) went to the jury along with Plaintiff's Third Claim for Relief ("Takings Claim under the United States Constitution). The Third Claim for Relief consisted of three Counts.

3.

Count One of the Third Claim for Relief (Lucas per se Regulatory Takings Claim) was the subject of Plaintiff's Motion for Summary Judgment as to liability which was granted by the court. Count One was given to jury for a determination of just compensation.

4.

Count Two of the Third Claim for Relief (Agins Claim) and Count Three of the Third Claim for Relief (Penn Central Claim) were given to the jury to determine both liability and compensation, if any.

5.

Defendant's Counterclaim was ordered dismissed and is hereby adjudged dismissed.

6.

The jury's verdict was in the form of answers to Interrogatories:

Question 1: Were the plaintiffs denied all economically viable or productive use of the subject 40 acres of timber while the ban on harvesting it was in effect?

Answer: Yes.

Question 2: Did the subject regulation advance a legitimate state interest:

(a) In that regard, did it single out the plaintiffs to bear a burden that should be borne by the public as a whole?

Answer: Yes.

(b) Did it require plaintiffs to provide nesting habitat if they were not a cause of the spotted owl being listed as a species threatened with extinction?

Answer: No.

Question 3: When compared with the plaintiffs' right to make economic productive use of the property, including their reasonable investment-backed expectations, was it necessary for the State to prevent them from harvesting 40 acres of their timber for a period of seven years in order to ensure the survival of the spotted owl as a species?

Answer: No.

Question 4: What was the fair market value of the subject 40 acres of timber in January 1994?

Answer: $333,000.

Question 5: What was the fair market value of the subject 40 acres of timber in August 2001?
Answer: $258,000.

MONEY AWARD

6. The name and address of the judgment creditor are:
Marsha and Alvin Seiber
45277 Wiley Creek Drive
Sweet Home, OR 97386

7 The name, address, number of the judgment creditor's attorney are:
Phillip D. Chadsey
Stoel Rives LLP
900 SW Fifth Avenue, Suite 2600
Portland, Oregon 97204; Phone: (503) 294-9376

8. The name, address and number of the judgment debtor are:
State of Oregon, Department of Forestry
2600 State Street
Salem, OR 97310; Phone: (503) 945-7213

9. The name of the judgment debtor's attorney is Paul J. Sundermier, Department of Justice 1162 Court Street NE, Salem, OR 97301

10. The name of any person or public body, other than the judgment creditor's attorney, who is entitled to a portion of a payment on the number is: None.

11. The amount of the initial money award is $75,000.00.

12. Prejudgment simple interest accrued at nine percent per annum on that amount from January 31, 1994 is due up to and including December 20, 2004 totals $73,473 and continue to accrue at the rate of $18.49 per day for each additional day between December 20, 2004, and the entry of judgment.

13. Attorney fees. $211,333.00

14. Costs and disbursements on the basis of ORCP 68A(2): $1,882.00

15. Post-judgment simple interest at the rate of nine percent per annum from the date of entry of the judgment until fully paid on $213,215 (fees and costs) and on $148,473 (money award and prejudgment interest) accruing at the

rate of $18.49 each day from December 20, 2004 until entry of judgment.

DATED this 23 day of Dec, 2004.

/s/ D.R. MURPHY
Daniel R. Murphy
Circuit Court Judge

SUBMITTED BY:
Phillip D. Chadsey, OSB No. 66028
Of Attorneys for Plaintiffs

APPENDIX O

PROCEDURES LEADING TO ENDANGERED SPECIES ACT COMPLIANCE FOR THE NORTHERN SPOTTED OWL

Including:

- Formal Section 7 Consultation Guidance
- Interim Recovery Strategy
- Conservation Planning for Non-Federal Actions
- Guidance for Incidental Take

U.S. Fish and Wildlife Service
Region 1
July 1990

This document was prepared by the U.S. Fish and Wildlife Service in Region 1, Portland, Oregon. For further information, please contact the following offices:

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OWL PROCEDURES MANUAL

INTRODUCTION

With a listing decision now made for the northern spotted owl and an effective date of July 23, 1990, many people are wondering exactly what changes may occur to timber harvest programs in order to adequately protect the owl. In this document, the U.S. Fish and Wildlife Service (Service) describes its consultation, recovery, law enforcement (taking) guidelines, and conservation planning processes in an attempt to lay out procedures that are consistent with provisions of the Endangered Species Act (ESA), applicable on the effective date for listing of the northern spotted owl. With the cooperation of the other Federal agencies, as well as State and private entities, these guidelines outline the most efficient way of doing business under the ESA, at least for the first year after a listing, and would help meet the goals of other applicable laws and regulations.

PURPOSES

1. To provide clear examples of how ESA processes may work for the spotted owl.
2. To provide clarification of the Service's view of the Interagency Scientific Committee's (ISC) conservation strategy.
3. To put ESA spotted owl guidance in an understandable, manual-type format for distribution to Federal and non-Federal sectors as a working document.

BACKGROUND

SECTION 7 OF THE ESA—FORMAL CONSULTATION FOR FEDERAL ACTIONS

Federal agencies that fund, authorize, or carry out actions which "may affect" listed species must consult with the Service under Section 7. Federal actions that are nondis-

cretionary or that have "no adverse effects" on listed species are not subject to formal consultation. For timber harvest activities, the "may affect" standard applies to harvest activities within a ½ mile radius of any known nest site or pair activity center. The Service believes that these actions represent a threshold standard for timber activities requiring formal Section 7 consultation.

Formal consultation always results in a biological opinion issued from the service to the action agency. The opinion always makes a likely to jeopardize" or "not likely to jeopardize" finding for the action subject to formal consultation. The finding takes into account the environmental baseline condition of the listed species, plus the direct, indirect, interrelated, and interdependent effects attributable to the Federal action at hand, together with the cumulative effects of State and private actions reasonably certain to occur in the area of the Federal action.

Biological opinions may contain suggestions for project/action modifications, ranging from reasonable and prudent alternatives (only in a "jeopardy opinion") to reasonable and prudent measures/terms and conditions (mandatory elements of an incidental take statement) to conservation recommendations (suggestions which are left to the discretion of the action agency to implement).

Standards for the determination of incidental take are of particular significance to any future biological opinions for the northern spotted owl. Incidental take of listed species is "take" (as defined by the Endangered Species Act) that occurs incidentally to otherwise lawful activities. An obvious example of incidental take would be unknowingly cutting a tree which contained an owl nest with eggs or young.

The Service believes that incidental take also occurs for timber harvest activities which may harm or harass northern spotted owls. In order to define such activities which result in

the most subtle type of incidental take, the Service convened a group of [illegible] biologists and developed incidental take guidelines w[illegible] consider the biology of the owl throughout its range. Such guidelines are described later in this document.

SECTION 9 AND 10 OF THE ESA—TAKE FOR NON-FEDERAL ACTIONS

Take of endangered or threatened species is prohibited under Section 9 of the Endangered Species Act. The 1982 Amendments to the ESA gave the Service a procedure to authorize the incidental take of listed species by non-Federal parties in much the same way a Section 7 consultation (Incidental Take Statement) can authorize incidental take for Federal actions. Private parties whose otherwise lawful actions will result in incidental take of a listed species can apply for a permit authorizing such take by submitting a permit application and a Habitat Conservation Plan (HCP) to the Service.

Conservation Planning is a term that generally refers to the Section 10(a)(1)(B) permit process. This manual will go through the general procedures necessary for a private party to submit a properly prepared permit application for processing.

SECTION 4 OF THE ESA—RECOVERY STRATEGY

The Service will ultimately have an approved recovery plan for every listed species, as set forth in Section 4 of the ESA. Right now, there are approved recovery plans for less than one-half of all listed species. Recovery plans set forth goals which, once achieved, can result in delisting the subject species.

An approved recovery plan is not necessary to carry out formal consultation under Section 7, to consider permit applications under Section 10, nor to enforce the prohibitions of "take" under Section 9. Nevertheless, recovery plans are

useful planning tools and may help guide and coordinate all conservation gained through Section 7 and Section 10, and focus such conservation actions on recovery and delisting. This manual will focus on the existing knowledge available, especially the ISC report, and make suggestions as to how the agencies can utilize such information as a potential recovery strategy.

DISCUSSION AND EXAMPLES

FORMAL CONSULTATION UNDER SECTION 7

It is the responsibility of the action agency (e.g., Forest Service and Bureau of Land Management) to determine which actions "may affect" threatened or endangered species, and to initiate consultation with the Service. As noted above, "may affect" situations for the owl are defined as those activities that involve harvest or related activities within spotted owl habitat, and/or harvest activities which may pose disturbances to nesting pairs within ½ mile of any known nest site or pair activity center, regardless of the suitability of the habitat.

Suitable habitat selected by northern spotted owls was described in the (ISC) conservation strategy as typically exhibiting ". . . moderate to high canopy closure; a multilayered, multispecies canopy dominated by large overstory trees; a high incidence of large trees with large cavities, broken tops, and other indications of decadence; numerous large snags; heavy accumulations of logs and other woody debris on the forest floor; and considerable open space within and beneath the canopy. These attributes are usually found in old growth, but they are sometimes found in younger forests, especially those that contain remnant large trees or patches of large trees from earlier stands. In younger forests that support breeding owls, the nest and major roost sites are usually found where large trees from the earlier, older stands remain." It is important to note that the age of forests is not as important a

factor in determining habitat suitability as are vegetational and structural components. Areas where consideration of spotted owl habitat may be especially important in consultation are: 1) habitat that is currently occupied by owls, 2) Habitat Conservation Area as defined in the ISC conservation strategy, and 3) areas of special concern as defined in the Service's 1989 Status Review Supplement.

Once the action agency has made the "may affect" determination, a written request should be made to the Service for formal consultation. This request should be accompanied by an assessment of the action and its impacts, and contain the following general categories of information (a more detailed outline for a biological assessment is provided in Appendix 1):

1. a description of the action to be considered;
2. a description of the specific area that may be affected by the action;
3. a description of any listed species or critical habitat that may be affected by the action;
4. a description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;
5. relevant reports, including any environmental impact statement or environmental assessment; and
6. any other relevant available information on the action, the affected listed species, or critical habitat.

After review of this information, the Service then prepares a biological opinion which includes:

1. an analysis of the direct and indirect effects, as well as the effects of interrelated and interdependent activities, and cumulative effects of reasonably certain State or private activities in the action area;

2. a biological opinion on whether the action is "likely to jeopardize" or "not likely to jeopardize" the continued existence of the species (reasonable and prudent alternatives will generally be provided if the opinion indicates that the proposed action is likely to jeopardize the continued existence of the species);

3. an incidental take statement which will identify the anticipated level of incidental take that will occur, and provide reasonable and prudent measures and terms and conditions for minimizing incidental take; and

4. conservation recommendations that, if implemented, would minimize impacts and promote the conservation of the species.

Reasonable and prudent measures and terms and conditions to minimize incidental take are mandatory, as are reasonable and prudent alternatives in a jeopardy opinion, and should be carried out by the action agency. Implementation of conservation recommendations, although strongly encouraged by the Service, is at the discretion of the action agency. A general outline for biological opinions is shown in Appendix 2.

The Forest Service and Bureau of Land Management (BLM) are considering dividing their sales into 3 categories for purposes of formal consultation:

1. all sold sales sold prior to FY-89;

2. planned and sold sales for FY-89 and 90 (Section 318 sales, and sales previously in conference); and

3. FY-91 planned sales.

Each Federal action "package" will result in a separate biological opinion issued by the Service to the Forest Service and the BLM (assuming both action agencies utilize similar consultation "packaging"). The Service is committed to issuing biological opinions on categories 1 and 2 within 30 days of receipt of the additional information necessary to complete

the administrative record (and as close as possible to any effective date of a listing).

In each biological opinion the Service would provide conservation recommendations and an Incidental Take Statement (where appropriate) based on the Interagency Cooperation Regulations found at 50 CFR Part 402. To display possible results from such opinions, and assuming the occurrence of incidental take, we have prepared a list of examples of reasonable and prudent measures that would minimize or avoid incidental take, and listed conservation recommendations that are applicable to incidental take (see Table 1). We have further divided the list into two parts. Measures and recommendations that are (1) based upon the ISC Conservation Strategy or (2) based upon current management plans. Departure from these "example" reasonable and prudent measures and conservation recommendations may be advised, if through coordination with the Service, it is determined that sound biological data and reasoning indicate that the species would benefit from such a departure.

Appendices 3A and 3B provide examples of possible conservation recommendations, applicable under Section 7(a)(1), that may further promote the conservation of the species. Similarly, the first list (Appendix 3A) is based upon the ISC Conservation Strategy, while the second (Appendix 3B) is based upon current management direction. These recommendations are not mandatory and are intended to provide an opportunity for the agency to further the conservation of the owl.

Comparisons between timber harvest actions "with ISC Strategy" and "without" were made at the request of the Department of the Interior. At the time of this writing, there are no other conservation strategies developed and presented for similar comparisons. If appropriate, future versions of this manual may analyze the likely conservation actions that

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would be called for under Section 7 if other, yet unknown, strategies were considered.

In the meantime, the ISC Conservation Strategy represents the most current management advice, developed through a multiagency working group that included the most knowledgeable owl experts. The strategy provides a long-term approach to owl management, consisting of major elements, that in combination comprise an integrated approach to conservation of the species. Deviations from the strategy in the short-term increase risk to its long-term success. Thus, the strategy provides a conservation goal against which all future actions will need to be measured. Since the strategy acknowledges the loss of habitat in conservation areas only through the 1990 sale program, it may be necessary to prepare a new or updated conservation strategy if the ISC's recommendations are not implemented in full prior to contracting 1991 sales.

Table 1. Examples of Reasonable and Prudent Measures Under Conservation in Incidental Take Statements for Federal Actions as Well as Applicable Conservation Recommendations

Reasonable and Prudent Measures and Conservation Recommendations Related to Incidental Take			
Sales Type	Limitations on Reasonable and Prudent Measures and Conservation Recommendations	Basis: Current Agency Management Plan Scenario	Basis: Agency Implementation of Interagency Scientific Committee Report
Sold Sales (pre-89 and FY-89/90 sold sales including sales under Section 318)	Sales are under contract, expense is high to modify contract.	Reasonable and Prudent Measures: Implement restrictions during the nesting season to protect pairs of spotted owls and their progeny. Conservation Recommendations: Protect pairs of spotted owls by adjusting unit boundaries, providing buffers, and use of forest practices which provide spotted owl habitat components.	Reasonable and Prudent Measures: Implement restrictions during the nesting season to protect pairs of spotted owls and their progeny. Conservation Recommendations: Protect pairs of spotted owls by adjusting unit boundaries, providing buffers, and use of forest practices which provide spotted owl habitat components.

(continued)

Sales Type	Limitations on Reasonable and Prudent Measures and Conservation Recommendations	Basis: Current Agency Management Plan Scenario	Basis: Agency Implementation of Interagency Scientific Committee Report
1990 Planned but Unsold Sales, including Sales proposed under Section 318	Limited time available to make adjustments during the planning process and coordinate the changes before fiscal year 1990 contracting deadlines. Additional expenses may be necessary to make changes.	Reasonable and Prudent Measures: Maintain adequate habitat within close proximity of pair site nd within their home ranges until a long-term conservation strategy is adopted. (See page 9, section on Incidental Take Guidelines under Sections 7 and 10.)	Reasonable and Prudent Measures: Protect pairs of spotted owls within HCAs by providing a ½ mile buffer around the pairs activity center. Outside HCAs protect 80 acres surrounding pair activity centers (as specified in the ISC Strategy). Implement seasonal restrictions during the nesting season to protect pairs of spotted owls and their progeny.
		Conservation Recommendations: Adopt the Interagency Scientific Committee Conservation Strategy, and eliminate or relocate timber harvest activities to areas outside proposed HCAs.	Conservation Recommendations: Eliminate or relocate timber harvest to areas outside HCAs.

(continued)

Sales Type	Limitations on Reasonable and Prudent Measures and Conservation Recommendations	Basis: Current Agency Management Plan Scenario	Basis: Agency Implementation of Interagency Scientific Committee Report
1991 and Future Sales	No known limitations	Reasonable and Prudent Measures: Maintain adequate habitat within close proximity of pair sites and within their home ranges until a long-term conservation strategy is adopted. (See page 9, section on Incidental Take Guidelines under Sections 7 and 10.)	Reasonable and Prudent Measures: Implement restrictions during the nesting season to protect pairs of spotted owls and their progeny that are located outside HCAs.
		Conservation Recommendations: Adopt the Interagency Scientific Committee Conservation Strategy, and eliminate or relocate timber harvest activities to areas outside HCAs.	Conservation Recommendations: Protect pairs of spotted owls by adjusting unit boundaries, providing buffers, and use of forest practices which provide spotted owl habitat components.

It is not possible to determine an exact point at which the continued existence of a species would be at jeopardy without fully analyzing proposed actions in relation to the environmental baseline. Therefore, the Service will analyze each Federal action submitted for formal consultation in turn and will make the "likely jeopardy/not likely jeopardy" finding on a case-by-case basis.

INCIDENTAL TAKE GUIDELINES UNDER SECTIONS 7 AND 10

The taking of any listed species is generally prohibited under Section 9 of the ESA and implementing regulations. There are, however, a number of exceptions to the taking prohibition.

The 1982 Amendments to the ESA gave the Service procedures to authorize the "incidental take" of listed wildlife species. These procedures are contained in Sections 7 and 10 of the ESA. "Incidental take" in this context is take which is "incidental to, and not the purpose of, carrying out otherwise lawful activities" (See 16 USC 1539 and Sec. 10(a)(1)(B) of the ESA).

The Service offers the following general guidance to address "incidental" take of northern spotted owls that may occur incidentally to timber harvest or related activities. The Service gives notice that any incidental take of northern spotted owls that results from activities carried out in a manner inconsistent with the guidelines (and not authorized under the provisions of Section 7 or Section 10 of the Act), will be subject to investigation by the Service pursuant to Section 9 of the Act.

It is important to note that the Service fully intends to consider all requests for incidental take authorizations under Section 7 (Federal) or Section 10 (State and private) of the Act, as appropriate. These interim guidelines are intended to present, to the best of our ability, guidance for addressing the

need for incidental take authorization; and therefore to provide guidance for reducing potential conflicts with Section 9 of the Act.

An obvious incidental take situation would exist if an otherwise lawful timber harvest activity would result in the direct loss of any individual (adult or young), or an active nest (with young or eggs). It is more difficult to determine when incidental take of owls might occur as a result of altering habitat surrounding a nest site or activity center of a pair of spotted owls.

Even more difficult is assessing when owls may be harmed or harassed by cutting within their home range. In these less obvious situations, the Service recommends that the project proponent initiate a dialogue with the Service to discuss the potential risk of incidental take. In the absence of such a dialogue, the Service offers the following stepwise approach which we believe is a reasonable procedure to reduce the risk that incidental take will occur. If the person engaged in timber harvest can demonstrate that these guidelines were followed, the Service does not intend to seek prosecution in the unlikely event that incidental take occurs in spite of implementing the guidelines.

The focus of our incidental take guidelines is on northern spotted owls, including their eggs and young. We therefore recommend the following stepwise approach to avoid and reduce the risk of incidental take:

1. Conduct spotted owl surveys during the breeding season and prior to any harvest activity according to the Forest Service protocols addressed in the Interagency Scientific Committee report. The Service may suggest other owl survey techniques in the near future. Such surveys should be a standard practice for planning timber harvest activities.

2. Avoid any harvest activity which results in less than 70 acres of the best suitable owl habitat encompassing the nest site and/or activity center of a pair of spotted owls.

3. Avoid any harvest activity which results in less than 500 acres of suitable habitat within a 0.7-mile radius (1000 acres) of a nest site and/or activity center. The 500 acres may include the 70 acres in No. 2 above and should be as contiguous as possible.

4. Avoid any harvest activity which results in less than 40 percent coverage by suitable owl habitat within a circle with a radius centered on a nest site/or center of activity and as prescribed by physiographic province (see Table 2). The 40 percent may include the acreage required in No. 2 and No. 3 above.

The Service recognizes that there is variation among individuals. Specific information on home range size, habitat use, nest site, or the center of activity of well-studied owls in similar habitat in the same portion of the range could be used to justify an exception to these guidelines and continue to avoid incidental take. In addition, habitat use information on which the above recommendations are based (see ISC 1990, USDI 1990) may change as a result of more recent studies, and the Service will continue to update its database to ensure that the most recent information is included.

To summarize the procedures for pursuing incidental take authorization for non-Federal activities, if incidental take is identified as a concern on State or private lands, individual landowners should consider development of a habitat conservation plan. The Section 10 (a)(1)(B) permit application can be submitted separately by individual applicants or through the appropriate State agency as described in the discussion on Section 10 permits in this document. The Service

strongly encourages a pre-application dialogue with any potential permit applicant at any time.

Table 2. Calculations to Develop Incidental Take Guidelines Based Upon Home Range Size by Physiographic Province.[1]

Province	Median Home Range Size		40 Percent of Median Home Range Size
	Acres	Radius	Acres
WASHINGTON			
Olympic Peninsula	9900	2.2 miles	3960
Cascades	6600	1.8 miles	2640
OREGON			
Cascades	2500	1.2 miles	1000
Coast Range	3400	1.3 miles	1360
Klamath	2500	1.2 miles	1000
CALIFORNIA			
Klamath	2500	1.2 miles	1000

[1] The Service will continue to revise this table as more data become available.

References:

Interagency Scientific Committee. 1990. Conservation strategy for the northern spotted owl. Report of the Interagency Scientific Committee to address the conservation of the northern spotted owl. U.S. Department of Agriculture, Forest Service, and U.S. Department of the Interior, Fish and Wildlife Service, Bureau of Land

Management, and National Park Service. Portland, Oregon.

U.S. Department of the Interior. 1990. 1990 Status Review. Northern Spotted Owl. Report to the U.S. Fish and Wildlife Service. Portland, Oregon.

HABITAT CONSERVATION PLANNING UNDER SECTIONS 9 AND 10

A permit from the Service pursuant to Section 10(a)(1)(B) of the ESA authorizes incidental take much as a Section 7 consultation does through an "Incidental Take Statement" for Federal actions. However, Section 10 of the ESA typically applies to non-Federal actions. Individuals, corporations, non-Federal government entities, States, and other parties can apply for an incidental take permit by submitting an application and a habitat conservation plan to the Service. "Conservation Planning" is the term often used to refer to this process. In the case of the owl, the Service recommends maximizing efficiency of effort by developing a habitat conservation plan which includes the incidental take requests for a number of entities through the appropriate State land-managing agency.

The issuance of an incidental take permit by the Service is contingent upon the applicant's development of a Service-approved conservation plan for the listed species affected by the subject project or action (a more detailed document, "Draft Conservation Planning Guidelines," is available from the Service's Portland Regional Office). Such a conservation plan must specify:

1. the anticipated impacts likely to result in take of listed species;

2. the mitigation and monitoring measures the applicant will undertake to alleviate the impacts of the taking;

3. alternative actions to such taking that were considered;

4. why these alternatives were not employed;

5. funding that will be provided to implement the mitigation measures and attendant conservation plan; and

6. additional measures that the Service may require as necessary or appropriate for the conservation of the species.

Because applicants may have difficulty in adequately addressing these conservation planning needs independently, the Service generally works with an applicant throughout the pre-application phase. Adequate quantification of impacts (i.e., incidental take) usually requires that the applicant: (1) define the conservation planning area, (2) collect necessary biological data on the species of concern, and (3) detail the proposed activities likely resulting in incidental take.

Upon receipt of the application and conservation plan, the Service may issue an incidental take permit if it determines that the following conditions have been met:

1. the taking will be incidental to the action;

2. the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of taking;

3. the applicant will ensure that adequate funding will be provided for the conservation plan and procedures to deal with unforeseen circumstances;

4. the taking will not appreciably reduce the likelihood of the survival and recovery of the subject species in the wild;

5. the applicant will ensure that other measures required by the Service will be provided; and

6. the plan will be implemented.

The third item above generally requires the development of an implementing agreement, which is a legal document binding all implementing parties to the proposed conservation plan.

The Service must also address the National Environmental Policy Act (NEPA) in the ESA Section 10(a)(1)(B) permit process. In most cases the Service delegates the development of information needed for preparation of NEPA documentation to the applicant to expedite the process. In general, if the incidental take permit will result in a significant net loss of individuals and/or habitat, an EIS likely will be required. This often adds 9 months to 1 year to the process. Conversely, if the permit will result in a net gain or insignificant net loss of individuals and/or habitat, an environmental assessment leading to a finding of no significant impact likely will be sufficient for NEPA compliance. In such a scenario, a permit could be considered for issuance in as little as 3 months.

Section 10 and Northern Spotted Owls

Timber harvest on State and private lands may result in the incidental take of northern spotted owls. Because the States authorize private timber harvest, they may be party to take on private lands, as well as on State lands. In the absence of an incidental take permit, this take would be a violation of ESA. The implications for the northern spotted owl are considerable, since a large portion of the total harvest volume in the owl's range comes from non-Federal lands. At least in California, important numbers of owls occur on private lands; there are fewer owls on private lands in Washington and Oregon.

There are two approaches to managing the Section 10 process for spotted owls. One is for the individual landowner to prepare an HCP and apply for an incidental take permit for his lands. The second is for the State to prepare an HCP for

all state and private timber lands. The Service would prefer to proceed with the latter approach, since it would add efficiency to the conservation planning process.

The States of Washington, Oregon, and California are at different stages in this process. In Washington and Oregon, the Service has notified the States of their potential responsibilities and initial informational discussions are beginning. In California, the State Board of Forestry, Department of Forestry, Department of Fish and Game, industry representatives, and the Service have been meeting regularly since November, 1989.

The State of California is planning to prepare an HCP covering timber management throughout the range of the subspecies in the state. The California HCP and accompanying NEPA process probably may not be completed until sometime in 1991. During the interim period, the State would attempt to prevent take through a review process that supplements its existing timber harvest permit procedure. In the meantime, large industrial timber firms have indicated their intent to proceed with individual HCPs.

RECOVERY PLANNING UNDER SECTION 4

Section 4(f) of the Endangered Species Act requires development and implementation of recovery plans for listed species. Recovery actions are meant to arrest or reverse the species' decline and neutralize the threats to its survival so that its long-term survival in the wild can be ensured.

A recovery plan delineates, justifies, and schedules the research and management actions necessary to support recovery of the species. Coordination among Federal, State, local agencies, organizations, and private entities is essential. Although recovery plans do not commit manpower or funds, they must identify site-specific management actions, estimate the time frame and costs for recovery, identify research needs, and establish measurable goals for recovery.

A recovery plan contains three parts. Part 1 is an overview of the species, its biology, life history, habitat requirements, and discussion of the threats that have led to its listing as an endangered or threatened species. Part 2 identifies the Service's goals and objectives for recovery of the listed species. These are presented in a step-down outline that recommends the steps that should be taken to help recover and delist the species. In most cases these recommendations are research oriented. Any recommended management actions may require NEPA documentation prior to implementation. Part 3 provides an implementation schedule that identifies the key players and the costs associated with recommended projects.

Development of a recovery plan requires a public review process prior to approval of the plan. There are no specific time frames associated with the development of a recovery plan, and a plan is not necessary for the Service to conduct Section 7 consultation, carry out research and management activities, or identify goals and objectives for the species. If the Service follows the normal procedure for producing a recovery plan, it is anticipated that two years would be required to complete the necessary steps before a plan would be finalized. A process for developing a recovery plan under these circumstances is described in Appendix 4. Specific guidelines that describe the recovery planning process are available from the Service.

Interagency Scientific Committee Conservation Strategy

The Fish and Wildlife Service, Forest Service, Bureau of Land Management, and the National Park Service entered into a charter under the 1988 Interagency Agreement on spotted owls to establish an Interagency Scientific Committee (Committee). This Committee was also recognized by Congress in Section 318 of Public Law 101-121. The purpose of this Committee was to assess all available information on the management and biology of the northern subspecies and

recommend a strategy for the conservation of the northern spotted owl. The Committee submitted "A Conservation Strategy for the Northern Spotted Owl" to report to Congress and the four agencies on April 4, 1990. The Forest Service must report to Congress on its intentions towards management of the owl by September 30, 1990.

As noted above, the Committee has produced a scientifically credible strategy for the long-term viability of the northern spotted owl. The agencies have endorsed the science associated with this plan, and are presently reviewing it to determine its acceptability as an approach to managing the owl under their multiple-use responsibilities. The Committee has utilized the best scientific information available, including contact with or the participation of all the most knowledgeable spotted owl experts in the process to develop this strategy.

The Service believes that this report represents the most comprehensive and in-depth analysis of the data available. The Service fully endorses the scientific credibility of the report and its applicability as a management approach for the northern spotted owl. Given this, the Service is reviewing this document for its applicability as a recovery plan under the Endangered Species Act (see Appendix 4).

This process followed to produce the ISC's plan has met two of the Service's requirements for development of a recovery plan. First, the most knowledgeable owl experts available, representing all major constituencies, were involved in its development. Secondly, the best available information was used to develop the strategy. Establishment of recovery goals, evaluation of the conservation strategy relative to these goals, and inclusion of a public review process would be required to complete the process.

In the interim, the Service strongly recommends that the agencies consider implementation of the conservation stra-

tegy, as fully described by the Committee. Acceptance and implementation of the strategy, as recommended, would provide a sound basis for Section 7 consultation, help address the issue of take on Federal and private lands, and reduce concern over the economic impacts of recovery and species management.

The conservation strategy includes a process for revision of the strategy as more and better information becomes available. In addition, the Service has recently established a coordinating committee under a 1990 interagency agreement (Attachment 5) with the States of California, Oregon and Washington, and the USDA Forest Service, Bureau of Land Management, and National Park Service. The intent of this new agreement is to provide a forum to coordinate the management and conservation of the northern spotted owl. The Services believes that these processes allow for an open and appropriate forum for consideration and inclusion of recovery goals, other issues that may arise, as well as adjustment of the strategy itself that may be required during its implementation.

CONCLUSION: OWL PROCEDURES MANUAL

The Tables and Appendices noted in the narrative are attached. The Owl Procedures Manual will be updated and augmented as new information becomes available. Components of future consultations, such as development of incidental take statements, will generally follow the direction of this manual, but may change based on new biological information and professional judgment.

APPENDICES

to

OWL PROCEDURES MANUAL

APPENDIX 1: Biological Assessment Information

In general, biological assessments for the pre-1989 and 1989-1990 timber sale programs should contain the following information. The Service will work with the agencies to identify the data needs for future sale reviews.

Biological Assessment Format

1. Introduction

   — Brief summary of the objectives of the Biological Assessment; reference the Forest plans or timber plans under which sales were prepared.

   — Address other listed species (species for which the "may affect" standard applies, or acknowledgement that such species have been consulted on separately).

2. Description of the Proposed Action

   — Description of the Forest Service's Pacific Northwest and Pacific Southwest Regions or the BLM Districts in Oregon including total acreage, description and amount of forested acres, and owl habitat information such as amount, distribution, etc., by land area under consideration. This information should be totalled by physiographic province and Forest or BLM District.

   — Description of the timber sale program being addressed.

   — For pre-1989 sales, where discretionary authority is retained, provide the following information, totaled by physiographic province and Forest or BLM District:

a. total number and volume of sales, and acreages by type (clearcut, shelterwood, amount and type of salvage, etc.)

b. number and list of "no effect" sales and justification for this determination.

c. number and list of "may affect" sales, including volumes and acreages of suitable and unsuitable habitat—indicate in the two lists above those sales that are located fully or partially within HCAs, SOHAs, Areas of concern, and/or ODFW/BLM agreement sites.

— For 1989-1990 sales, provide the following information, totalled by physiographic province and Forest or BLM District;

a. total number and volume of sales, and acreages by type (clearcut, shelterwood, amount and type of salvage, etc.);

b. number and list of "no effect" sales and justification for this determination;

c. number and list of "may affect" sales, including volumes and acreages of suitable and unsuitable habitat, for both discretionary and non-discretionary sales; also indicate if the sale has been surveyed 0, 3, or 6 times, and whether the sale complies with the 50-11-40 rule

d. indicate in the lists above, those sales that are located fully or partially within HCAs, SOHAs, Areas of Concern, and/or ODFW/BLM agreement sites.

e. description of other activities that may be subject to future Section 7 consultation.

3. Description of the Affected Environment

   — Definition of spotted owl habitat and the amount in acres within each physiographic province, Forest and BLM District.

   — Biological data on listed species (historical use, presence, potential use); information and/or other documents containing such information may be incorporated by reference

   — Spotted owl information (from data bases, 1985 to Present) should include information on all owls, pairs and singles, and those unaffected by the timber sale programs.

4. Analysis of the Effects of the Action

   — General description

   — Direct and indirect effects such as habitat loss, dispersal habitat, number of owl pairs affected, etc. Indicate the amount of owl habitat (distinguish dispersal habitat when possible) proposed to be removed or altered (from partial harvest) in each physiographic province and Forest. This section should also include a summary analysis of effects on owl pairs from any or all of the following: sales within 0.5 mile of activity centers/nest sites; sales within 2.1/2.5 miles (home ranges); sales within 2.1/2.5 miles, where habitat would be reduced to below the minimum used by owl pairs in that province; and sales within Areas of Concern, as described in the Service's 1989 Status Review on the owl. It is important that this summary reflect the cumulative impacts to an owl pair from all sales affecting the pair.

— Interrelated and interdependent actions such as roads, silviculture treatments, recreational projects, etc.

— Cumulative impacts—future State and private actions, especially when these activities would affect owl pairs with home ranges overlapping federal and state or private lands.

— Brief discussion of other listed species - provide an analysis of effects of the action to other listed species.

5. Alternatives Considered

— Brief discussion of alternatives for sale, etc.

— Describe conservation measures implemented to reduce or minimize impacts to spotted owls or habitat.

— Prepare a contingency plan for situations where owl pairs are found in active timber sales.

— Summary of program changes as a result of the above (for 318 package). Forest Service Region 5 will provide changes in the 1989-1990 sales program.

6. Conclusions (for the timber sale package submitted for formal consultation)

— How will the action (package) affect each listed species:

a. no adverse affect;

b. may adversely affect; or

c. may beneficially affect?

— Request consultation for those which may affect (adversely or beneficially).

Information Needs

To aid our analysis of impacts to owls in the biological opinions, and to complete our administrative record, the Service has requested that the agencies provide information, in a Table format, on owls and owl habitat.

— Number and list of owl pairs and singles (including those whose status is unconfirmed), by Forest or BLM District. This list should include those pairs whose home range or 2.1/2.5 miles radius circle overlaps adjacent state or private lands.

— For each owl pair affected by the program, provide the following information:

  a. pre-harvest acres of suitable habitat available to the pair within 0.5 miles and between 0.5 and 2.1/2.5 miles.

  b. acres of owl habitat removed within those distances, for each sale and for all sales (cumulative); and

  c. whether the pair is located in an area of concern, HCA, SOHA, or ODFW/BLM Agreement area.

— Database tables for individual timber sales brought forward for consultation.

— Short narratives from each Forest and BLM District to address selected parts of the above outline and summarize the biological evaluations for each sale.

The following provides a description of the general format that the Service follows when it provides a biological opinion to an action agency under Section 7 of the ESA.

Biological Opinion Format

1. Introduction

   a. Identify the issue and species in consultation

2. Biological Opinion

   a. Succinct statement (...is/is not likely to jeopardize, . . . will/will not adversely modify critical habitat) for each species.

3. Description of the Proposed Action

   a. Cite Public Notice, EIS, plan document, or rationale for packaging from biological assessment.

   b. Include interrelated, interdependent actions considered.

4. Species Account

   a. Status and biology of listed and proposed species.

5. Effects of the Proposed Action on Listed Species

   a. Cite past Opinions to same agency, recovery plans, Biological Assessments, etc., for species accounts.

   b. Include species information relevant to action area.

   c. Explain effects that are adverse or beneficial.

   d. If jeopardy, stress aspects that cause jeopardy.

   e. Provide a basis for reasonable and prudent alternatives, and/or conservation recommendations.

6. Cumulative Effects

7. Reasonable and Prudent Alternatives

   a. If appropriate, but only for jeopardy findings.

8. Incidental Take

   a. Include sections in order.

      1. anticipated incidental take.
      2. reasonable and prudent measures to minimize incidental take.

3. terms and conditions necessary to implement reasonable and prudent measures.
4. instructions on disposition of dead animals.

b. See Table 1 in this document

9. Conservation Recommendations

a. See Appendices 3A and B in this document.

10. Closing

11. Literature Cited

APPENDIX 3A: Section 7 Consultation—Example Conservation Recommendations likely to be Recommended if the Interagency Scientific Committee Conservation Strategy Serves as the Basis for Consultation

The Service will provide conservation recommendations under Section 7(a)(1). These recommendations are not mandatory, but are intended to assist the agency in implementing actions that may result in the conservation of the owl.

1. The Forest Service and Bureau of Land Management should coordinate with the Service to develop a tracking procedure that will monitor implementation of the sale program and document the following: the total number of owls impacted and at what levels; and the total amount of owl habitat removed from the environmental baseline.

2. Proposed sale areas and owl sites should be surveyed a minimum of 6 times within a given season to provide a reasonably accurate data base from which to make sound management decisions.

3. The Forest Service and Bureau of Land Management should coordinate with the Service and State resource agencies to design and conduct spotted owl research and monitoring efforts, including banding and telemetry programs and studies of habitat utilization.

4. Design, implement, and monitor timber harvest prescriptions to minimize impacts to the spotted owl and, in the long term, create or restore the necessary components of owl habitat. Consider testing the following prescriptions on a site specific basis, as appropriate:

    a. Selectively harvest to retain a specified number of green trees per acre, thereby facilitating more rapid development of a multi-layered canopy.

    b. Leave sufficient snags and down woody material to provide for the prey base requirements for spotted owls. Refer to the research paper by Spies, et al. (1988) for guidelines. Coordinate with fire and pest management specialists.

    c. Burn post-harvest fuels only as necessary for fuel reduction and insect control. Retain large down logs where possible. Coordinate with fire and pest management specialists.

    d. Treat stands of young trees to facilitate more rapid production of large trees and well-developed multi-storied stands.

    e. Create or improve the decadent tree component by topping or girdling large trees. Coordinate with fire and pest management specialists.

    f. Selectively harvest to encourage understory development while retaining overstory canopy closure of 40% or more.

        1. Leave sufficient green trees (at least 12 per acre, individually and in clusters of mixed species and ages) to serve as the upper canopy layer as habitat recovers its value for nesting, roosting, and foraging activities of spotted owls; and

g. Within shelterwood harvests, leave 8-15 mature trees per acre to provide the components of spotted owl nesting, roosting, and foraging habitat. Eliminate the final overstory removal phase.

5. Work closely with adjacent Federal, State, and private landowners to properly manage spotted owl habitat on a landscape level, monitor owls and the effects of timber sale-related activities, and design sales to avoid adverse impacts to spotted owls.

6. Consider evaluating allowable sale quantities on an acreage basis in addition to a volume basis to provide increased flexibility in managing for spotted owls and other environmental values in terms of habitat capabilities.

7. Adjust the timber base through your planning process to account for habitat reserved or managed for the spotted owl to help assure its long term survival.

8. Consider reducing the annual allowable sale quantities to facilities implementation of the ISC Conservation Strategy and conserve spotted owl habitat.

9. Coordinate the funding, development, and maintenance of a geographic information system that is compatible between Federal and State land management and fish and wildlife resource agencies for the long-term tracking of spotted owls and their habitat.

APPENDIX 3B: Section 7 Consultation—General Conservation Recommendations Likely to be Recommended if the Interagency Scientific Committee Conservation Strategy does Not Serve as the Basis for Consultation

These recommendations are based upon the Service's knowledge of current management scenarios being pursued by the Forest Service (SOHA system) and Bureau of Land Management (ODFW agreement areas).

1. Eliminate or relocate the timber sales/units that are within 0.5-miles of a pair, and/or would reduce the amount of owl habitat to less than the minimum known to be used by owl pairs in each province.

2. Eliminate or relocate timber sales/units in areas of special concern (as identified in the Service's 1989 Status Review) unless an interagency plan for the conservation of dispersal habitat has been implemented.

3. Prioritize timber sales so that sales not impacting spotted owl pairs and/or spotted owl habitat are contracted first. Sales which have a minor impact should be contracted second, and sales that have a major impact should be offered last and only when absolutely necessary.

4. The Forest Service and Bureau of Land Management should coordinate with the Service to develop a tracking procedure that will monitor implementation of the sale program and document the following: the number and kinds of recommendations that are implemented; the total number of spotted owls impacted and to what degree; and the total amount of spotted owl habitat removed from the environmental baseline.

5. Proposed sale areas and owl sites should be surveyed a minimum of 6 times within a given season to provide a reasonably accurate data base from which to make sound management decisions.

6. The Forest Service and Bureau of Land Management should coordinate with the Service and State resource agencies to design and conduct spotted owl research and monitoring efforts, including banding and telemetry programs and studies of habitat utilization.

7. Management plans should be developed, in coordination with state and Federal wildlife agencies and the

Forestry Sciences Labs, to provide for the long-term development and maintenance of nesting, foraging, and dispersal habitat necessary to maintain the northern spotted owl. Particular attention should be paid to avoiding impacts to spotted owls and restoring habitat within the identified areas of special concern.

8. Timber harvest activities should be minimized within relatively large, contiguous blocks of spotted owl habitat. Consider aggregating, instead of dispersing, these activities within the forest landscape, to avoid increasing fragmentation of remaining spotted owl habitat. Allow for changes in harvest prescription, from clearcut to commercial thinning or individual tree marking, to preserve necessary owl habitat components.

9. Design, implement, and monitor timber harvest prescriptions to minimize impacts to the spotted owl and, in the long-term, create or restore the necessary habitat components of owl habitat. Consider testing the following prescriptions on a site specific basis, as appropriate:

   a. Selectively harvest to retain a specified number of green trees per acre, thereby facilitating more rapid development of a multi-layered canopy.

   b. Leave sufficient snags and down woody material to provide for the prey base requirements for spotted owls. Refer to the research paper by Spies, et al. (1988) for guidelines. Coordinate with fire and pest management specialists.

   c. Burn post-harvest fuels only as necessary for fuel reduction and insect control. Retain large down logs where possible. Coordinated with fire and pest management specialists.

d. Treat stands of young trees to facilitate more rapid production of large trees and well- developed multi-storied stands.

e. Create or improve the decadent tree component by topping or girdling large trees. Coordinate with fire and pest management specialists.

f. Selectively harvest to encourage understory development while retaining overstory canopy closure of 40% or more.

— Leave sufficient green trees (at least 12 per acre, individually and in clusters of mixed species and ages) to serve as the upper canopy layer as habitat recovers its value for nesting, roosting, and foraging activities of spotted owls; and

— Within shelterwood harvests, leave 8-15 mature trees per acre to provide the components of spotted owl nesting, roosting, and foraging habi-
tat. Eliminate the final overstory removal phase.

10. Work closely with adjacent Federal, State, and private landowners to properly manage spotted owl habitat on a landscape level, monitor owls and the effects of timber sale-related activities, and design sales to avoid adverse impacts to spotted owls.

11. Consider evaluating allowable sale quantities on an acreage basis in addition to a volume basis to provide increased flexibility in managing for spotted owls and other environmental values in terms of habitat capabilities.

12. Adjust the timber base through your planning process to account for habitat reserved or managed for the spotted owl to help assure its long term survival.

13. Consider reducing the annual allowable sale quantities to facilitate implementation of the ISC Conservation Strategy and conserve spotted owl habitat.

14. Coordinate the funding, development, and maintenance of a geographic information system that is compatible between Federal and State land management and fish and wildlife resource agencies for the long-term tracking of spotted owls and their habitat.

APPENDIX 4: Recovery Strategy

Approach 1: If the agencies implement the ISC conservation strategy as a management plan for the northern spotted owl, the Service can use this approach as an interim recovery plan while the strategy is being assessed through the recovery planning process for its applicability and acceptability as a formal recovery plan. Therefore, the Service recommends the following approach:

June/July 1990

- The agencies indicate their acceptance and intentions towards implementation of the Conservation strategy.
- The Service will convene a group of recognized experts (which may include members of the Scientific Committee and the Listing Review Team) to review the strategy in relation to the requirements and mandates of the Endangered Species Act and the feasibility of adopting the ISC plan for recovery planning purposes.

July 1990

- A report will be provided to the Service on the applicability of the ISC Conservation Strategy as a recovery plan.

- The Service will announce a decision to proceed with the recovery planning process using either the Conservation Strategy or another approach.
  - — If the Conservation Strategy is appropriate as a recovery plan, the Service will pursue its obligations to consider public input prior to finalization of the document as a recovery plan and to complete the planning processes.
  - — If the Service decides to pursue development of another recovery planning document, procedures described in Approach 2 would be followed.

January 1991

- Finalize and approve recovery plan (if the ISC strategy is the recommended approach).

Approach 2: If the Service follows a normal process for developing a recovery plan, it is recommended that a "classic" scientific recovery team be established for the owl. Through the ISC team effort and the Listing Review Team there are a number of highly qualified persons identified as good candidates to serve on the Team. As a mechanism for the science of recovery to interface with land management concerns, the Team Leader should participate in the Interagency Northern Spotted Owl Conservation Group (formally ISOC) meetings. The ISC report provides a good starting point for a recovery plan; the Service will need to look closely at this document in establishing recovery goals and objectives.

July 1990

- Send out letters to agencies, universities, etc. requesting nominations to recovery team. Expertise will be sought in the following areas:
  1. northern spotted owl ecology,
  2. conservation biology,

3. population genetics,
4. population ecology,
5. biogeographical modeling with expertise in geographic information systems; and
6. old growth forest management.

August 1990

- Select recovery team, and schedule first team meeting.

September 1991

- Complete draft recovery plan for public review and comment.

March 1992

- Finalize and approve a recovery plan.

April 1992 and Beyond

- Implement the recovery plan. This could be done using an implementation team approach. Representatives would include those from: Forest Service, Bureau of Land Management, State wildlife agencies, State forestry departments, timber industry, and environmental groups.
- A management oversight group and technical group could be formed to advise the Service (oversee) research and management actions affecting recovery of the northern spotted owl.

APPENDIX 5: 1990 Interagency Agreement (attached)

MEMORANDUM OF AGREEMENT

AMONG

STATE OF CALIFORNIA
THE RESOURCES AGENCY

STATE OF WASHINGTON
DEPARTMENT OF WILDLIFE,

STATE OF OREGON
DEPARTMENT OF FISH AND WILDLIFE,

U.S. DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE,
BUREAU OF LAND MANAGEMENT,
NATIONAL PARK SERVICE,

AND

U.S. DEPARTMENT OF AGRICULTURE
FOREST SERVICE

TO ESTABLISH AN INTERAGENCY
NORTHERN SPOTTED OWL CONSERVATION GROUP

This Memorandum of Agreement ("Memorandum") is entered into this 13th day of April, 1990, among the State of California Resources Agency, the Oregon Department of Fish and Wildlife, the Washington Department of Wildlife, the U.S. Fish and Wildlife Service, the USDA Forest Service, the Bureau of Land Management, and the National Park Service (collectively called the "Public Agencies").

WHEREAS, all parties to this Memorandum of Agreement recognize that they each have responsibilities under their statutory authorities that cannot be delegated and that this Memorandum cannot and is not intended to abrogate any of their independent decision-making responsibilities, and

WHEREAS, the Public Agencies are among the Federal and State agencies that have regulatory authority or responsibility under certain Federal and State statutes to manage for the northern spotted owl (Strix occidentalis caurina) and its habitat, and

WHEREAS, the multiple sources of authority under which the Public Agencies operate do not provide any individual agency with the authority to implement a comprehensive program to provide for the long-term conservation of the northern spotted owl across its historic range, and

WHEREAS, the Federal Agencies have entered into an interagency agreement to cooperate in ensuring the conservation of the spotted owl, and

WHEREAS, the Public Agencies desire that their activities, to fulfill their respective responsibilities with regard to the conservation of the northern subspecies of the spotted owl, be coordinated in such a manner as to ensure effective, timely, and mutually beneficial use of financial and personnel resources, and

WHEREAS, the Public Agencies share the common goal of ensuring the conservation for the northern spotted owl,

THEREFORE, it is mutually agreed and understood that:

PURPOSE OF MEMORANDUM

The Public Agencies have entered into this Memorandum to establish an Interagency Northern Spotted Owl Conservation Group to develop and ensure compliance with cooperative programs related to the conservation of the northern spotted owl.

INTERAGENCY NORTHERN SPOTTED OWL CONSERVATION GROUP

Secretary, State of California, The Resources Agency

Director, State of Washington, Department of Wildlife

Regional Director, U.S. Fish and Wildlife Service, Portland, Oregon

Regional Forester, U.S. Forest Service, Portland, Oregon

Director, Pacific Northwest Experiment Station, Portland, Oregon

Regional Forester, U.S. Forest Service, San Francisco, California

State Director, U.S. Bureau of Land Management, Portland, Oregon

State Director, U.S. Bureau of Land Management, Sacramento, California

Regional Director, National Park Service, San Francisco, California

Regional Director, National Park Service, Seattle, Washington

Director, State of Oregon, Department of Fish and Wildlife

OPERATION

1. The Regional Director of the U.S. Fish and Wildlife Service shall chair the Interagency Northern Spotted Owl Conservation Group (Interagency Group) for a period of 2 years from the date of execution of this agreement. Chairperson of the Interagency Group shall rotate on an annual basis among the participating agencies. Future chairpersons will be chosen by the Interagency Group.

2. The Interagency Group will meet as frequently as agreed upon by a majority of the voting members. Meetings shall be called by the Chairperson.

3. The Interagency Group may establish, or rely on, existing coordinating or working groups, as necessary or appropriate, to address specific issues relative to northern spotted owl conservation.

RESPONSIBILITIES

1. Identify, consider, and recommend, as appropriate, management and research activities for the conservation of the northern spotted owl.

2. Direct activities of any coordinating or working groups established by the Interagency Group.

3. Exchange information, coordinate, and provide standards and guidelines for needed management, monitoring, and research activities related to the conservation of the northern spotted owl.

4. Serve as a discussion forum for and liaison with all interest groups to serve as a common source of information and to address identified problems or conflicts.

5. TERM AND AMENDMENTS

This agreement is subject to all applicable laws and regulations. This Agreement may be amended upon the written consent of all parties. Parties to this Agreement may withdraw from this Agreement at any time upon written notice to the Interagency Group chair.

All signatories to this Memorandum agree to seek mutually agreeable solutions to achieve its purposes.

IN WITNESS WHEREOF, THE PARTIES HERETO have executed this Memorandum, on the date(s) set forth, as of the day and year last written.

Memorandum of Agreement to Establish an Interagency Northern Spotted Owl Conservation Group

By /s/ unreadable Date April 13, 1990
Director, State of Oregon
Department of Fish and Wildlife
Portland, Oregon

By /s/ unreadable Date April 13, 1990
Director, State of Washington
Department of Wildlife
Olympia, Washington

By /s/ David M. Jay Date 4-13-90
for Regional Forester
U.S. Forest Service
San Francisco, California

By /s/ unreadable Date 4-13-90
Regional Forester
U.S. Forest Service
Portland, Oregon

By /s/ unreadable Date 4-13-90
Director
Pacific Northwest Experiment Station
Portland, Oregon

By /s/ unreadable Date April 13, 1990
Regional Director
U.S. Fish and Wildlife Service
Portland, Oregon

By /s/ unreadable Date April 13, 1990
for State Director
U.S. Bureau of Land Management
Sacramento, California

By /s/ Elaine Y. Zelinski Date April 13, 1990
for State Director
U.S. Bureau of Land Management
Portland, Oregon

By /s/ unreadable Date April 19, 1990
for Regional Director
National Park Service
San Francisco, California

By /s/ unreadable Date April 13, 1990
Acting Regional Director
National Park Service
Seattle, Washington

By /s/ unreadable Date April 19, 1990
Secretary, State of California
The Resources Agency
Sacramento, California

APPENDIX P

UNITED STATES DEPARTMENT OF THE INTERIOR

FISH AND WILDLIFE SERVICE
Oregon Fish and Wildlife Office
2600 S.E. 98th Avenue, Suite 100
Portland, Oregon 97266
(503) 231-6179 FAX: (503) 231-6195

Reply To: 8539.4001(00)
TS Number: 02-5729 June 3, 2002

Phillip D. Chadsey
Stoel Rives
Standard Insurance Center
900 SW Fifth Avenue, Suite 2300
Portland, Oregon 97204-1268

Dear Mr. Chadsey:

At the court's direction, we have been working to develop alternatives for Alvin and Marsha Seiber to consider in the development of a habitat conservation plan (HCP) to address the possibility of incidental take of the northern spotted owl. We appreciated the opportunity to visit the Seiber's property on April 21, 2002, and talk with Marsha Seiber and Jerry Whaley, who assists with managing the property. The visit was helpful in evaluating the changes that had occurred to the property since the original incidental take permit application was received November 26, 1999, and since U.S. Fish and Wildlife Service (Service) representatives last visited the property on January 25, 2000. The site visit provided new information as to the current forest conditions.

As you know, the recent history of the Little Wiley Creek spotted owl site has shown that a pair was last observed in 1996. There were no spotted owls observed during surveys in 1997-98, but a male was observed in the vicinity in 1999 and 2000. There were no observations of spotted owls in 2001

and in the two survey visits conducted this year there have been no detections.

Briefly, during our recent site visit we learned that a storm with high winds in early February 2002, had blown down or uprooted many trees in the 40 acre area at issue. Mrs. Seiber indicated that this storm event revealed a greater than previously recognized presence of laminated root rot, a fungal disease that affects the roots of certain tree species. Both healthy and diseased trees were subject to windthrow or partially uprooted. In some cases the falling of trees damaged or knocked down additional trees creating scattered openings. These openings may increase the risk of future windthrow. We also learned that the Seibers are in the process of cutting about 25 acres of timber southwest of the subject 40 acres and have recently completed harvesting about 15 acres, leaving little suitable habitat in that area.

This latest information on the extent of the root rot and the windthrow problems likely affects the ability of owls to utilize the area in the near future. The current openings due to these natural processes have degraded the habitat suitability of the stand for spotted owls. These openings also increase the possibility of future blowdown. In addition, the recent harvest by the Seibers has further limited the amount of interior forest conditions in the immediate vicinity of the 40 acres. The forest area surrounding the Little Wiley Creek spotted owl activity center is highly fragmented and has continued to experience timber harvest since the Seibers submitted their HCP. These new landscape conditions in and around the Little Wiley Creek activity center will likely discourage spotted owl nesting, though not necessarily preclude it.

One additional factor that can affect spotted owl use of the area is the presence of barred owls, which often displace spotted owls when they move into an area. Because spotted owls and barred owls are closely related they consider each other as competitors for the same resources. In addition,

barred owls are more aggressive than spotted owls and are most likely to prevail in any territorial dispute. The presence of individual barred owls in the vicinity of the Little Wiley Creek site has been documented for the past few years. However, recent survey on the evening of May 29, 2002, documented the presence of a pair of barred owls about one mile northwest of the Seiber property. Pairs of owls are generally more territorial than individuals, especially if they are engaged in nesting activities. No other owls were observed during this particular survey.

Considering this new information, especially the presence of a pair of barred owls, we believe that it is unlikely that spotted owls would continue to occupy the area. The reduction of forested area, the fragmentation of forest stands, and the newly discovered presence of a pair of barred owls would deter spotted owls from using the area. This, combined with the intermittent presence of an unpaired spotted owl, suggest that the area will no longer be likely to attract and maintain spotted owls. For these reasons, we believe that the planned activities by the Seibers are not likely to result in a take of spotted owls under the Endangered Species Act at this time, and therefore a section 10 incidental take permit is no longer required.

If you have any questions, please contact Richard Szlemp at (503) 231-6179.

Sincerely,

Kemper M. McMaster
State Supervisor

cc. Dorothy R. Burakreis
Diane K. Hoobler

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No. 07-48

FILED
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IN THE

Supreme Court of the United States

MARSHA SEIBER and ALVIN SEIBER,

Petitioners,

v.

STATE OF OREGON, by and through the OREGON STATE BOARD OF FORESTRY,

Respondent.

Petition for Writ of Certiorari to the Oregon Court of Appeals

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BRIEF FOR RESPONDENT STATE OF OREGON IN OPPOSITION

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QUESTIONS PRESENTED

In this case, the Oregon Court of Appeals analyzed petitioners' regulatory takings claim that was brought under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), by using the "whole parcel" rule that this Court employed in that case and that the Court subsequently has reaffirmed. Although petitioners suggest that there is some conflict between what the state appellate court did and this Court's post-*Penn Central* case law, in fact there is no conflict. Petitioners also do not identify any conflict between the state appellate court's "whole parcel" analysis and the analysis employed in *Penn Central* cases by any federal appellate court or state supreme court. In addition, petitioners misstate some of the facts on which they base their argument. Moreover, it is not clear that the state appellate court would have reached a different result even if that court had not utilized the whole parcel rule.

In sum, this Court already has held that the "whole parcel" rule applies in analyzing *Penn Central* claims; there is no conflict for this Court to resolve; and this case involves nothing more than the case-specific application of settled law to a particular set of facts.

(1) Under these circumstances, should this Court grant certiorari to review the issue of whether the "whole parcel" rule applies when analyzing *Penn Central* claims? A subsidiary question is whether this case is a poor vehicle to use to reexamine the validity of the whole parcel rule where petitioners base their arguments on facts that they skew in their favor, and

where the state court might well have reached the same result in any event even without applying the whole parcel rule.

Petitioners had a jury trial in state court. Special verdicts were returned by the jury. The state appellate court determined that some of those verdicts were not controlling on the court because they did not consider the parcel as a whole, but rather focused on only a part of it. The court also concluded that some of the verdicts represented legal conclusions or findings of ultimate fact, rather than findings of historical fact.

(2) In this situation, should this Court grant certiorari to consider whether the state appellate court erred in its treatment of the particular, and in some respects rather unusual, jury verdicts returned in this case and, if so, whether that interfered with any federal constitutional right to a jury trial that petitioners may have in this inverse condemnation case?

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The decision of the Oregon Court of Appeals is reported. *Seiber v. State of Oregon*, 219 Or. App. 215. 149 P.3d 1243 (2006). The Oregon Supreme Court's order denying review can be found at *Seiber v. State of Oregon,* 342 Or. 633, 157 P.3d 788 (2007).

STATEMENT OF THE CASE

Petitioners own and live on a property of about 200 acres, much of which contains commercial timber. (Tr. 189).[1] The property was inherited in 1986. (Tr. 189). The timber on the property is second-growth. The property was clear cut in the 1930s or 1940s. (Tr. 190, 269). In 1970, the federal government listed the Northern spotted owl as a threatened species. (Tr. 79-80). In 1990 and 1991 respectively, the state Board of Forestry adopted first temporary and then permanent rules requiring that a 70-acre area be protected around a spotted owl nest site. (Tr. 81-83). A 70-acre area is needed to protect young owls because they often jump out of the nest before they can fly, and hop and move around on the ground, where they are vulnerable to predators such as great horned owls. (Tr. 162-63). The state has retained that 70-acre requirement because there is no research indicating that a smaller area will suffice to protect the owls. (Tr. 93).

An owl pair began nesting on a neighboring property in 1992. (Tr. 141). The owls nested on that

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[1] The citation is to the transcript of the state court proceedings.

neighboring property in 1994. (Tr. 141). They were heard in the area in 1995 and 1996, although not in 1997, but they did not nest again. (Tr. 142). In 2000, the female owl was seen in the area, about two miles away. (Tr. 143).

In 1994, Mrs. Seiber had a conversation with a state forestry official. At that time, she wanted to log about 40 to 50 acres on her property, but she was told that she would not be able to do that because of the presence of the spotted owls. (Tr. 194-95). She did not submit any formal notification of her intent to log the area, however. (Tr. 208-09). If she had submitted an application or notification, it would have been denied. (Tr. 109-10). In 1998, she submitted an application to log within the so-called "core area" designed to protect the owls (Tr. 111, 125). It was denied. (Tr. 126).

In August 2001, petitioners were told that they could log in the 40-acre area in which logging had been denied. (Tr. 205). The restriction on logging can be lifted once owls have not been seen for five years, and that time had passed. As of February 2003, however, petitioners had not removed downed trees from the 40-acre area. (Tr. 395). Throughout the period from January 1994 until August 2001, petitioners harvested timber from other portions of their property. (Tr. 120-24, 154-56, 379-82).[2]

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[2] Additional facts will be set out in the discussion *post*.

REASONS FOR DENYING THE PETITION

Petitioners assert that this Court should grant certiorari because the case presents "an important question of federal law that has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." (Pet. Cert. 8). With regard to the question of whether the "whole parcel rule" applies to claims brought under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), petitioners suggest that this Court has not settled that issue, and that the state appellate court's conclusion that the rule applies when analyzing *Penn Central* claims is contrary to this Court's decisions. On the contrary, however, this Court repeatedly has held that the whole parcel rule applies when evaluating regulatory takings claims under the *Penn Central* framework. In reaching that same conclusion in this case, the state appellate court followed this Court's settled precedent.

Petitioners do not even attempt to show any conflict between the state appellate court's whole parcel analysis and the decisions of any federal court of appeals or any state supreme court. At one point, they note that a factor that may weigh in the decision whether to grant certiorari is whether "a state court of last resort has decided a federal question in a way that conflicts with the decision of a federal court of appeals." (Pet. Cert. 8, citing Rule 10(b)). But petitioners never purport to identify any decision of any federal court of appeals that is contrary to the state appellate court's decision in this case.

Because, with respect to petitioners' attack on the whole parcel rule, the state appellate court simply applied settled law to the facts of this case, there is no reason for this Court to grant the petition. In addition, petitioners misrepresent (or at least skew) some of the facts on which they rely. Furthermore, the state appellate court might have reached the same result even if it had not applied the whole parcel rule.

Petitioners also complain that they were denied their right to a jury trial in state court in this inverse condemnation case. (Pet. Cert. 16). While it is not clear that they have such a federal right in state court, in fact they had a jury trial. Their real complaint is that they disagree with the state appellate court that certain special verdicts returned by the state court jury represent legal conclusions or, at the most, findings of ultimate fact, rather than findings of historical fact. This Court's treatment of similar questions indicates that the state appellate court did not err. Furthermore, the special verdicts submitted to the jury in this case are at least in some respects unusual and idiosyncratic. Thus, the jury-verdict issue as presented in this case is not apt to have broad effect.

A. The state appellate court's use of the whole parcel rule when analyzing petitioners' *Penn Central* claim is consistent with this Court's decisions, and creates no conflict.

In this case, the state Court of Appeals relied on the "whole parcel" rule when considering petitioners' regulatory takings claim based on *Penn Central.* (Pet. Cert., App. C 9a-13a). Petitioners contend that the

state court erred because, according to them, "the 'whole parcel' rule does not apply to a claim under the *Penn Central* line of cases." (Pet. Cert. 9) (initial capitals and boldface omitted). Petitioners grudgingly admit that *Penn Central* itself seems to adopt that rule, although they describe that aspect of this Court's decision as "dicta." (Pet. Cert. 10). But they argue that "this Court's cases following *Penn Central* indicate that the 'whole parcel' rule does not apply to claims under *Penn Central*." (Pet. Cert. 11). This Court's case law, however, refutes their contention.

In *Penn Central*, this Court acknowledged that "whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case,'" and involves "essentially ad hoc, factual inquiries[.]" 438 U.S. at 124, quoting *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958) (bracketed material in *Penn Central*). Nevertheless, the Court outlined some of the "factors that have particular significance" when analyzing what has come to be known as a *Penn Central* regulatory-takings claim.

> The economic impact of the regulation on the claimant and, particularly the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. * * * So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be charac-

> terized as a physical invasion by government, *see, e.g., United States v. Causby*, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Penn Central, 438 U.S. at 124 (additional citation omitted).

Later in its opinion, this Court embraced the whole parcel rule.

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in *the parcel as a whole* — [there] the city tax block designated as the "landmark site."

Id. at 130-31 (emphasis added). The whole parcel rule is based, at least in part, on the recognition that "[t]o the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question." *Concrete Pipe & Products of Cal, Inc. v. Construction La-*

borers Pension Trust for Southern Cal., 508 U.S. 602, 644 (1993).

And this Court's language adopting the whole parcel rule is not "dicta," as petitioners contend. This Court was rejecting Penn Central's claim that the loss of its "'air right' above" Grand Central Terminal should be considered separately. Instead of that narrow focus, when considering whether a taking had been effected this Court considered the parcel as a whole, that is, "the city block designated as the 'landmark site'" by the city. *Id.* at 131.

It is true that subsequently in *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001), this Court expressed some uncertainty about the whole parcel rule. The Court observed that:

> Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, *see, e.g., Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497 (1987); but we have at times expressed discomfort with the logic of this rule, *see Lucas* [*v. South Carolina Coastal Council*, 505 U.S. 1003,] 1016-17 n. 7 [(1992)] * * *.

Palazzolo, 533 U.S. at 631 (other citations omitted).

But that observation *is* merely dictum. The Court did "not explore the point" any further in that case. *Id.* And, later in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), this Court unambiguously reaffirmed the cen-

tral role of the whole parcel rule when analyzing a *Penn Central* claim. In *Tahoe-Sierra,* the Court noted that

> Justice Brennan's opinion for the Court in *Penn Central* did * * * make it clear that even though multiple factors are relevant in the analysis of regulatory takings claims, in such cases *we must focus on " the parcel as a whole*[.]"

Tahoe-Sierra, 535 U.S. at 326-27 (emphasis added; quotation from *Penn Central* and citation omitted). In other words, this Court requires "that the aggregate must be viewed in its entirety[.]" *Id.* at 327 (internal quotation marks omitted). Based on that same principle, it is not enough to effect a regulatory taking if one stick out of the bundle of property rights is affected or impaired by a regulation. The Court has affirmed that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Id.*, quoting *Andrus v. Allard,* 444 U.S. 51, 65-66 (1979).

In *Tahoe-Sierra*, petitioners argued that a compensable taking had occurred, relying on a temporal segmentation of their property and focusing on time periods when moratoria on development were in effect. This Court rejected that approach, reaffirming *Penn Central*'s whole parcel approach.

> Petitioners' "conceptual severance" argument is unavailing because it ignores *Penn Central*'s admonition that in regulatory takings cases *we must focus on*

> *"the parcel as a whole."* 438 U.S. at 130-31. We have consistently rejected such an approach to the "denominator" question. *See Keystone,* 480 U.S. at 497. *See also Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.,* 508 U.S. 602, 644 (1993) ("To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question").

535 U.S. at 331 (emphasis added).

Thus, contrary to petitioners' assertion that "this Court's cases following *Penn Central* indicate that the 'whole parcel' rule does not apply to claims under *Penn Central*" (Pet. Cert. 11), this Court's decisions, and in particular its decision in *Tahoe-Sierra*, point in precisely the opposite direction. The Court repeatedly and consistently has applied the whole parcel rule in *Penn Central* cases. Petitioners, in effect, ask this Court to upset and overturn long-settled law.

In arguing that the whole parcel rule is somehow inconsistent with this Court's takings jurisprudence, petitioners also rely on decisions from this Court that they claim "make clear that *Penn Central* provides a distinct theory of recovery that does not require a plaintiff to prove that his or her 'whole parcel' of property was affected by government regulation." (Pet. Cert. 10). For that proposition, petitioners rely on *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005),

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), and *Palazzolo*. (Pet. Cert. 10-11).

There is no doubt that *Chevron*, *Lucas*, and *Palazzolo*, as well as other decisions, including *Penn Central*, make it clear that *Penn Central* "provides a distinct theory of recovery," as petitioners put it. But that a theory of recovery is "distinct" hardly demonstrates what the components of that theory are. And none of those decisions, or any other decision of which the State is aware, holds, as a matter of federal law at least, that a *Penn Central* claim does "not require a plaintiff to prove that his or her 'whole parcel' of property was affected by government regulation," to again quote petitioners.[3]

As it came before this Court, *Lingle* did not involve a *Penn Central* claim. The Court remanded so that claim, as well as others, might be considered by lower courts. 544 U.S. at 548. *Lingle* says nothing that indicates that whole parcel analysis does not apply to *Penn Central* claims. In the footnote in *Lucas*, on which petitioners rely (Pet. Cert. 10), this Court simply recognized that a *Penn Central* claim is a possible alternative to a *Lucas* claim that a regulation

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[3] Actually, petitioners' assertion is a bit off the mark in another respect as well. The issue is not whether a plaintiff must prove that her whole parcel *was affected* by government regulation, but rather whether, when the whole parcel is considered in the calculus, a *Penn Central* regulatory taking has occurred.

has deprived the claimant of all economically beneficial use of his property. 505 U.S. at 1019 n. 8. Nothing in that observation undermines or calls into question the whole parcel rule. Finally, in *Palazzolo* the Court did not hold "that the plaintiff could proceed under a *Penn Central* theory, even though he was only prohibited from developing a portion of his property," as petitioners contend. (Pet. Cert. 10). Instead, the Court merely recognized again that a *Penn Central* claim proceeds on a theory different from that which applies to a *Lucas* claim. 533 U.S. at 617. And, as noted above, although this Court mentioned the "denominator" question in passing in its opinion in *Lucas*, ultimately the Court did not explore the point. *Id.* at 631.

Despite their initial intimation that there might be a case-law conflict (Pet. Cert. 8), petitioners do not cite a single case from any state or federal court that they contend rejects the whole parcel rule in the context of a *Penn Central* regulatory takings case. And, although it sometimes may be difficult to identify which parcel is the relevant "whole" one,[4] there ap-

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[4] *See, e.g., Dist. Intown Properties Ltd. Partnership v. Dist. Col.*, 339 U.S. App. D.C. 127, 198 F.3d 874, 880 (1999), *cert. denied* 531 U.S. 812 (2000); *Giovanella v. Conservation Comm. of* Ashland, 447 Mass. 720, 857 N.E.2d 451, 456-58 (2006), *cert. denied* 127 S. Ct. 1826 (2007); *Machipongo Land & Coal Co. v.* Commonwealth, 569 Pa. 3, 799A.2d 751, 768, *cert. denied* 537 U.S. 1002 (2002). That problem is not present in this case. Petitioners never have contended that the 40-acre parcel is a property separate from

pears to be no conflict between the state appellate court's whole parcel analysis in this case and the decision of any federal court of appeal or state supreme court. *See, e.g.* , **federal cases**: *Walcek v. United States,* 303 F.3d 1349, 1356 (Fed. Cir. 2002); *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172, 176 (4th Cir. 1988); *Coalition for Gov. Procurement v. Federal Prison Industries,* 365 F.3d 435, 483 (6th Cir. 2002); *Armour and Co. v. Inver Grove Heights*, 2 F.3d 276, 278 (8th Cir. 1993); *MacLeod v. Santa Clara County*, 749 F.2d 541, 546-47 (9th Cir. 1984), *cert. denied* 472 U.S. 1009 (1985); *Clajon Production Corp. v. Petera*, 70 F.3d 1566, 1577 (10th Cir. 1995); *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1079 (11th Cir. 1996), *cert. denied* 522 U.S. 981 (1997). *See also* **state decisions**: *Wonders v. Pima County,* 207 Ariz. 576, 89 P.3d 810, 815 (2004); *Buckley v. Cal. Coastal Com.,* 68 Cal. App. 4th 178, 80 Cal. Rptr. 2d 562, 572 (1998), *cert. denied* 528 U.S. 816 (1999); *Animas Valley Sand & Gravel, Inc. v. Bd. Comm. Plata Cp.,* 38 P.3d 59, 67, 69 (Col. 2001); *Bauer v. Waste Management,* 234 Conn. 221, 662 A.2d 1179, 1197 (1995); *Leon County v. Gluesenkamp,* 873 So.2d 460, 466 (Fla CA 2004); *Greater Atlanta Homebuilders Ass'n v. DeKalb County,* 277 Ga. 295, 588 S.E.2d 694 (2003); *City of Coeur D'Alene v. Simpson*, 142 Idaho 839, 136 P.3d 310, 319-20 (2006); *Dept. of*

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the remainder of their property and that the 40 acres is the whole parcel. Instead, their claim is that the whole parcel rule does not apply in *Penn Central* cases.

Natural Resources v. Indiana Coal Council, Inc., 542 N.E.2d 1000, 1003 (Ind. 1989), *cert. denied* 493 U.S. 1078 (1990); *LaSalle National Bank v. City of Highland Park*, 344 Ill. App. 3d 259, 799 N.E.2d 781, 792 (2003), *appeal denied* 208 Ill.2d 539, 809 N.E.2d 1287, *cert. denied* 543 U.S. 984 (2004); *Fitzgarrald v. Iowa City*, 492 N.W.2d 659, 665-66 (Iowa 1992), *cert. denied* 508 U.S. 911 (1993); *McPherson Landfill, Inc. v. Board of County Comm'rs.*, 274 Kan. 303, 49 P.3d 522, 540 (2002); *Seven Islands Land Co. v. Maine Land Use Reg. Comm.*, 450 A.2d 475, 482 (Me. 1982); *City of Annapolis v. Waterman*, 357 Md. 484, 745 A.2d 1000, 1022-23 (2000); *Giovanella v. Conservation Comm. of Ashland*, 447 Mass. 720, 857 N.E.2d 451, 456-58 (2006), *cert. denied* 127 S. Ct. 1826 (2007); *K & K Construction, Inc. v. Dep't Natural Resources*, 456 Mich. 570, 575 N.W.2d 531, 536, *cert. denied* 525 U.S. 819 (1998); *Johnson v. City of Minneapolis*, 667 N.W.2d 109, 114-15 (Minn. 2003); *Kelly v. Tahoe Regional Planning Agency*, 109 Nev. 638, 855 P.2d 1027, 1035 (1993); *Quirk v. Town of New Boston*, 140 N.H. 124, 663 A.2d 1328, 1332-33 (1995); *Smith v. Mendon*, 4 N.Y.3d 1, 822 N.E.2d 1214, 1221 (2004); *Machipongo Land & Coal Co. v. Dept. of Envtl. Prot.*, 569 Pa. 3, 799 A.2d 751, 768, *cert. denied* 537 U.S. 1002 (2002); *Wild Rice River Estates. Inc. v. City of Fargo*, 705 N.W.2d 850, 855-56 (N.D. 2005), *cert. denied* 126 S. Ct. 2039 (2006); *Brunelle v. Town of South Kingston*, 700 A.2d 1075, 1082 (R.I. 1997); *Sea Cabins on the Ocean v. City of N. Myrtle Beach*, 345 S.C. 418, 548 S.E.2d 595, 603 (2001); *Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 256 n. 16 (Utah App. 1998); *In re Interim Bylaw, Waitsfield*, 170 Vt. 541, 742 A.2d 742,

744 (1999); *Presbytery of Seattle v. King Co.*, 114Wn.2d 320, 787 P.2d 907, 915, *cert. denied* 498 U.S. 911 (1990); *R.W. Docks & Slips v. State*, 244 Wis.2d 497, 628 N.W.2d 781, 789, *cert. denied* 534 U.S. 1041 (2001); *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717, 730-31 (Wyo. 1985), *appeal dismissed* 476 U.S. 1110 (1986).

Thus, there is no case law conflict for this Court to resolve. Petitioners in reality ask this Court to grant certiorari to review the application of settled case law to a particular set of facts.

In sum, in claiming that this Court's decisions undermine the *Penn Central* whole parcel rule, petitioners seek to minimize the decisions that are flatly inconsistent with their position, rely on dictum, and attempt to derive from the unremarkable observation that a *Penn Central* claim is distinct from other regulatory takings theories the unprecedented rule that the whole parcel doctrine does not apply to such claims. In *Penn Central* and *Tahoe Sierra* (and in other decisions), this Court already has resolved the legal issue petitioners present to the Court. The Court has held that the whole parcel rule applies to *Penn Central* claims. Petitioners have identified no unresolved issue that warrants this Court's attention, and there is no conflict amongst the decisions of this Court or between the decision of the state Court of Appeals and that of any other court, state or federal. This Court should deny the petition.

B. In any event, petitioners misstate or skew some of the facts on which they rely, and this case would be a poor vehicle for review.

Petitioners contend that "[t]he record in this case provides a sound foundation upon which the Court can clarify the law." (Pet. Cert. 12). They also assert that "[t]he Oregon Court of Appeals' result would have been different if it had used the correct standard." (Pet. Cert. 13). The accuracy of both of those assertions is doubtful.

Petitioners' contentions are grounded on certain factual claims: (1) "they lost significant income because many of the trees in the protected area became infected with root rot that caused them to blow down during the seven years that the logging ban was in effect" (Pet. Cert. 13); (2) although the state appellate court believed petitioners "'were free to sell future contingent logging interests,' 149 P.3d at 1247," in actuality there was no such market (Pet. Cert. 13); and (3) "the subject regulation singles Petitioners out to bear a burden that is not imposed upon many of their neighbors who own commercial timberlands." (Pet. Cert. 13). In support of that last claim, petitioners note, accurately, that spotted owls generally prefer old-growth forest, and they intimate, incorrectly, that they have been "singled out" because they have such forests, while their neighbors have been free to cut their timber and escape spotted-owl regulation. (Pet. Cert. 15-16).

At best for petitioners, each of those claims is questionable. To take the last one first, at trial everyone agreed that petitioners do not have old-growth

timber on their land. (Tr 54, 190). Instead, the timber was clear cut in the 1930s or 1940s. And, thus, there is nothing about the age of petitioners' timber that sets them apart from neighboring landowners (not that the record reveals anything about when any of them may have cut their timber). And there is nothing to show that petitioners have been "singled out." After all, in this case the owl nest site was not on petitioners' land, but on the land of a neighboring landowner, who also was subject to the temporary restriction on logging in the affected area. The record does not indicate how many other landowners in the area may have been subject to similar restrictions (although petitioners cite an Oregon atlas indicating that owl populations within the western Oregon Cascades spotted owl "province" are "moderately high"). (Pet. Cert. 14 n. 2, quoting *Atlas of Oregon* 51 (2d ed. 2001)).

And petitioners exaggerate both the extent of the blow-down problem in the "core area" on their property that was protected for the owls and their eagerness to address that problem. At trial, expert plant pathologists testified that there was relatively little evidence of laminated root rot in that area of petitioners' property. (Tr. 560-61, 564-65, 584-85). The infestation spreads very slowly. (Tr. 562). In addition, petitioners have known about the root rot since 1988, but had not managed to clean out the affected trees before 1994, when they first were told they could not log in the affected area. (Tr. 214-15). As noted, the logging restriction was lifted in August 2001. Yet, as of February 2003, petitioners had not removed the rotted trees from the area. (Tr. 395). Thus, the impact

of the regulation on even this limited portion of their property is less than they suggest, and it is not clear that it was the regulation, as opposed to petitioners' own delay, that prevented them from removing any diseased logs earlier.

Finally, it is not clear that the state appellate court erred in suggesting that petitioners "were free to sell future contingent logging interests." 149 P.3d at 1247. Without any record citation, they contend that they "presented evidence that there was no market for future interests from such a small parcel." (Pet. Cert. 13). But the State presented evidence that such a market might exist. (Tr. 462, 503).

In sum, it is not clear that the state appellate court's decision "would have been different if it had used the [purportedly] correct standard" (Pet. Cert. 13), by which petitioners mean if the court had considered not the whole parcel, but the approximately 40 acres subject to the temporary limitation on logging. Even looking solely at that limited portion of petitioners' property it is not at all clear that a *Penn Central* taking was effected. That uncertainty counsels against a grant of the petition in this case. If the state court would have reached the same result even under petitioners' proposed standard, there is no need to consider the broader legal question pressed by petitioners in this Court, which becomes merely abstract.

A final point remains with respect to whether this is the right case in which to consider petitioners' arguments. Petitioners' arguments are based, at least in part, on the assertion that "the whole parcel rule should not apply in this instance, when the taking

involves, not the land as a whole, but a distinct and separate natural resource on the land." (Pet. Cert. 11). Petitioners suggest that they had a separate property right in their uncut timber. Even if that were true, as noted above this Court has held that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Tahoe-Sierra*, 535 U.S. at 327, quoting *Andrus*, 444 U.S. at 65-66. In any event,

> [u]nder Oregon law, * * * timber is part of the underlying real property unless it is subject to a contract to be cut. ORS 71.1070(2); *see Paullus v. Yarbrough*, 219 Or 611, 637, 347 P2d 620 (1959) (timber constitutes goods under Uniform Sales Act when agreement to sever timber exists). In this case, no contract to cut the timber existed, and no basis exists, as a matter of state property law, for viewing plaintiff's property interest in the timber as separate from its interest in the real property.

Coast Range Conifers v. Board of Forestry, 339 Or. 136, 150-51, 117 P.3d 990 (2005) (footnotes omitted).

Thus, as a matter of state property law, petitioners do not have a separate and distinct property interest in their uncut timber, which, during the pertinent time period, was not the subject of any contract to cut it. Once again, a premise that underlies petitioners' arguments is false. Even if this Court were inclined to grant the petition to reexamine the whole

parcel rule, this case would be a poor vehicle to use to undertake that reexamination.

C. Petitioners were not denied any right to a jury trial.

Petitioners contend that they have a federal constitutional right to a jury trial in a takings case in state court. (Pet. Cert. 16). Although they admit that they have no Seventh Amendment right to a jury trial in an inverse condemnation case in state court (Pet. Cert. 16), *see Montgomery v. Del Monte Dunes*, 526 U.S. 687, 719 (1999) (Seventh Amendment does not apply to suits brought in state court), they attempt to cobble together such a right from "the Seventh Amendment, together with the Fifth Amendment[.]" (Pet. Cert. 16). It may be doubtful whether that alchemy creates any federal constitutional right to a jury trial in a state court case such as this one. Petitioners cite no case recognizing such a right.

But, in any event, the question is of nothing more than academic interest in this case because petitioners had a jury trial in state court. Their complaint, more accurately, is that the state Court of Appeals disagreed with them about whether certain special verdicts returned by the state court jury amount to findings of fact.

The special verdicts in this case consisted of the following questions and answers.

> Question 1: Were the plaintiffs denied all economically viable or productive use of the subject 40 acres of timber while the ban on harvesting it was in effect?

Answer: Yes.

Question 2: Did the subject regulation advance a legitimate state interest:

(a) In that regard, did it single out the plaintiffs to bear a burden that should be borne by the public as a whole?

Answer: Yes.

(b) Did it require plaintiffs to provide nesting habitat if they were not the cause of the spotted owl being listed as a species threatened with extinction?

Answer: Yes.

Question 3: When compared with the plaintiffs' right to make economic productive use of the property, including their reasonable investment-backed expectations, was it necessary for the State to prevent them from harvesting 40 acres of their timber for a period of seven years in order to ensure the survival of the spotted owl as a species?

Answer: No.

Question 4: What was the fair market value of the subject 40 acres of timber in January 1994?

Answer: $333,000.

> Question 5: What was the fair market value of the subject 40 acres of timber in August 2001?
>
> Answer: $258,000.

(Pet. Cert. 6-7, App. M).

The Oregon Court of Appeals determined that "[t]he jury's answers to questions 1, 4, and 5 are, indeed, findings of historical fact that are supported by evidence in the record." (Pet. Cert., App. C 11a). "In light of the 'whole parcel" rule, however, the answers to those questions are of limited relevance because they do not call on the jury to consider the use of the 40 acres, or its loss of value, in the context of plaintiffs' entire 200 acres." (Pet. Cert., App. C 11a-12a). "Question 2, by its phrasing, applies to plaintiffs' *Agins* [*v. Tiburon*, 447 U.S. 255 (1980),] claim, which, [the court had] decided, cannot survive *Lingle*." (Pet. Cert., App. C 12a).

> In any event, part (a) of question 2 does not ask for a determination of historical fact. By asking whether plaintiffs' burden "should" have been borne by the public, the question asks for a legal conclusion or, at the most, a finding of ultimate (as opposed to historical) fact. Part (b) of question 2 is, of course, indisputable: nobody ever asserted that plaintiffs are responsible for the endangered status of the spotted owl. Question 3, like question 2(a), does not call for a finding of historical fact; rather, it re-

> quires the jury to weigh the plaintiffs' economic harm, including their investment-backed expectations, against the public benefit to be derived from the survival of the spotted owl as a species. *That is precisely the legal issue that the court must decide based on undisputed historical facts. Coast Range Conifers*, 339 Or at 155.

(Pet. Cert., App. C 12a) (emphasis added).

The court then turned to that ultimate issue. The court concluded that the regulation did not effect a physical appropriation of petitioners' property, and that it was "part of a regulatory plan developed to ensure maintenance of forestland 'consistent with sound management of * * * wildlife resources and scenic resources * * * and to ensure the continuous benefits of those resources for future generations of Oregonians.'" (Pet. Cert., App. C 12a, quoting Or. Rev. Stat. § 527.630(1)) (ellipses in Court of Appeals opinion). "Therefore, the character of the government actions does not weigh heavily in plaintiffs' favor." (Pet. Cert., App. C 12a, citing *Penn Central*, 438 U.S. at 124). "On the facts presented, viewed in light of the 'whole parcel' rule that is now the governing principle in both Oregon and federal takings cases," the court "conclude[d] that the temporary deprivation of logging rights to 20 percent of plaintiffs' property, pursuant to a statutory and regulatory plan to preserve resources for 'future generations of Oregonians,' was not a taking." (Pet. Cert., App C 12a-13a).

In arguing that the state Court of Appeals erred in its treatment of the special verdicts, petitioners' approach generally is to distort what the court did. According to petitioners, the state appellate court "ignored the jury's findings and determined for itself whether Petitioners had been deprived of all economically viable use of their property." (Pet. Cert. 17-18). And "the court [supposedly] rejected the jury's findings on Questions 1, 4, and 5[.]" (Pet. Cert. 18). The court, "in a feat of legal legerdemain, then proceeded to determine for itself that the parcel as a whole was not denied all economically viable or productive use. When it made that determination, the court usurped the jury's function and denied Petitioners their constitutional right to a jury trial as to that factual issue." (Pet. Cert. 18).

Of course, that is not what the state appellate court did. It did not "ignore" or "reject" any of the jury's answers to the special verdict questions. The court simply observed, correctly, that because questions 1, 4, and 5 all focused solely on the 40-acre parcel, they were "of limited relevance because they [did] not call on the jury to consider the use of the 40 acres, or its loss of value, in the context of plaintiffs' entire 200 acres." (Pet. Cert., App. C 11a-12a). That is, they deviated from the whole parcel rule. The jury simply made no finding regarding whether petitioners had been deprived of all beneficial economic value in their whole 200 acre parcel. Thus, contrary to petitioners' suggestion (Pet. Cert. 17), the state appellate court's decision is not contrary to this Court's decision in *Del Monte Dunes,* in which this Court held that the issue of "whether a landowner has been deprived of all eco-

nomically viable use of his property," although a mixed question of law and fact, "is a predominantly factual question" to be decided by a jury. 526 U.S. at 720. In this case, the jury had not answered the correct question.[5]

In any event, it is somewhat outrageous for petitioners to accuse the state appellate court of, "in a feat of legal legerdemain, then proceed[ing] to determine for itself that the parcel was a whole was not denied all economically viable or productive use." (Pet. Cert. 18). Near the close of trial, petitioners' attorney agreed to "stipulate that they [that is, petitioners] were not denied all economic value of 200 acres. *That's not an issue. We've got all kinds of evidence of that.*" (Tr. 685) (emphasis added). Furthermore, that is not what the state appellate court decided. It was resolving a *Penn Central* claim, not a *Lucas* claim. Instead, the state court decided, applying the *Penn Central* factors, that petitioners had failed to prove a *Penn Central* claim.

And, as the state appellate court correctly decided, that is a legal issue for the court. As the Oregon Supreme Court recognized in its *Coast Range Conifers* decision, "[i]n determining whether a regulatory taking had occurred, the *Penn Central* Court weighed those factors [it identified] and other factors based on the historical facts that the state court had found. *The Court did not remand the case so that a trier of*

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[5] In addition, petitioners do not pursue their *Lucas* claim in this Court.

fact could weigh those factors." 339 Or. at 155 (emphasis added). "*Penn Central* makes clear that the question whether the undisputed facts establish that a challenged regulation effects a taking presents a question of law for the court." *Id.*

Furthermore, even if the state court had erred, this case would be a poor vehicle to use to consider petitioners' jury trial claim. To put it mildly, at least some of the jury questions submitted in this case are idiosyncratic and not apt to appear in other cases. For example, the jury was asked whether petitioners had been required to provide nesting habitat for owls "if they were not a cause of the spotted owl being listed as a species threatened with extinction[.]" Why petitioners should have to be such a "cause" is unclear. The jury also was asked, "[w]hen compared with the plaintiffs' right to make economic productive use of the property, including their reasonable investment-backed expectations, was it *necessary* for the State to prevent them from harvesting 40 acres of their timber for a period of seven years in order to ensure the survival of the spotted owl as a species[.]" (Emphasis added). Again, why, in order not to effect a taking, the regulation must be "necessary" to prevent the owls' extinction is not clear. The unusual jury interrogatories submitted in this case make it a poor vehicle for review of the broader jury-trial claim presented by petitioners.

CONCLUSION

For the reasons given above, this Court should not grant the petition for a writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MARSHA SEIBER and ALVIN SEIBER,
Petitioners,

v.

STATE OF OREGON, by and through the
Oregon State Board of Forestry,
Respondent.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

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MARSHA SEIBER and ALVIN SEIBER,
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v.

STATE OF OREGON, by and through the Oregon State Board of Forestry,
Respondent.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This Court should grant the petition for writ of certiorari because it presents two important questions of federal law, decided incorrectly by the Oregon Court of Appeals and denied review by the Oregon Supreme Court. The state court decided both of those issues in a way that conflicts with the applicable decisions of this Court. First, the state court decided that petitioners could pursue their regulatory takings claim under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), only on a "whole parcel" theory. That holding contradicts this Court's rulings. Second, by subscribing erroneously to the "whole parcel" theory, the state court was able to ignore a jury's findings that entitled petitioners to

relief. This Court should grant the petition to develop its prior decisions and to confirm that the state court acted contrary to those decisions.

Petitioners reply here to address two new arguments raised in the respondent's opposition brief. First, respondent errs when it contends that the Oregon Court of Appeals "followed this Court's settled precedent" regarding regulatory takings. Post-*Penn Central* cases that respondent discusses appear to *confirm* a plaintiff's ability, in a case like this one, to pursue a regulatory taking claim free from any rule that the taking must embrace the total value of the "whole parcel." Second, respondent is wrong to assert that state property law prevents petitioners from asserting a federal regulatory takings claim.

A. This Court's Regulatory Takings Cases Indicate that a Plaintiff May Assert a Partial Takings Claim Under *Penn Central*.

Petitioners submit that this Court's precedents regarding regulatory takings allow for partial taking claims. Respondent's assertion to the contrary that those precedents are "settled" and require the "whole parcel" rule shows only that, to the extent that there is any ambiguity, this court should accept review to resolve it.

In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court considered whether the state's denial of a landowner's application for partial filling of wetland acreage constituted a compensable taking. In the courts below, the landowner had brought only a claim for a total regulatory taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). 533

U.S. at 623-24. The landowner argued for the first time in this Court that he also had a *Penn Central* non-total regulatory taking claim because the regulation deprived him of all rights except the building of a residence on the property. *Id.* Although the Court ultimately declined to address the plaintiff's *Penn Central* claim for non-preservation, it noted that

> "[w]here a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action."

Id. at 617.

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the Court again addressed a case in which the *Penn Central* issue was not fully raised but noted again the existence of the *Penn Central* remedy for non-total takings. This Court noted that "[t]he starting point for the [lower] court's analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework." 535 U.S. at 331. In so noting, this Court recognized that there are cases in which a "total taking" does not occur, and that, in those cases, courts should evaluate the factors described in *Penn Central* to determine whether the circumstances of the particular case at hand constitute a compensable taking. The Court underscored that point, finding it "perfectly clear" that "Justice Black's oft-quoted com-

ment about the underlying purpose of the guarantee that private property shall not be taken for a public use without just compensation *applies to partial takings as well as total takings.*" *Id.* at 333 n.27 (emphasis added).

Palazzolo and *Tahoe-Sierra* make clear that this Court has contemplated a remedy, under *Penn Central*, for regulatory takings that do not take all economically beneficial use of the parcel. As described in petitioners' petition for writ of certiorari, the Oregon Court of Appeals acted contrary to those precedents in this case when it ignored the jury's finding regarding the economic impact of the state's timber regulation and decided for itself that the whole parcel rule barred petitioners' claim.

B. State Property Law Cannot Bar Petitioners' Federal Takings Claim.

Respondent suggests that state property law prevents petitioners' federal takings claim and that, therefore, this case is a poor candidate for review. Respondent is wrong, because changes in state property law cannot encroach upon the protections of the United States Constitution.

Under the Constitution, state courts may not redefine their states' property laws in order to avoid a regulatory taking of property for a public use. *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 167 (1998) ("[A] State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law."); *see also Hughes v. State of Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring: "[A] State [court] cannot be permitted to defeat the constitutional prohibition against taking property without due

process of law by the simple device of asserting retroactively that the property [right] it has taken never existed at all."), *cited with approval in Lucas*, 505 U.S. at 1030. To do so would constitute an impermissible taking by judicial decree. Barton H. Thompson, Jr., "Judicial Takings," 76 Va. L. Rev. 1449 (1990); *see also Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (Scalia and O'Connor, JJ., dissenting from denial of certiorari, stating that "[n]o more by judicial decree than by legislative fiat may a State transform private property into public property without compensation"). As it has before, this Court should again accept review to correct the Oregon courts' construing the Fifth Amendment in order to avoid a regulatory taking. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374 (1994).

The state property law cited by respondent in this case would retroactively transform the nature of the property from what it was when petitioners initially filed this lawsuit. The Oregon Supreme Court's decision in *Coast Range Conifers v. Board of Forestry*, 339 Or. 136, 150-51, 117 P.3d 990, 997-998 (2005), made a major change in Oregon property law when it announced that "timber is part of the underlying real property unless it is subject to a contract to be cut." Prior Oregon precedent had stated that a growing crop, including timber, was property separate from the land. *Hawkins v. City of La Grande*, 315 Or. 57, 70-71, 843 P.2d 400, 407-408 (1992); *Paullus v. Yarbrough*, 219 Or. 611, 623, 347 P.2d 620, 626 (1959); *see also Franke v. Welch*, 254 Or. 149, 151-152, 458 P.2d 441, 443 (1969) ("there is nothing to preclude an owner of timberland from conveying or reserving all of his interest in the timber separate from the land," including even trees not yet germinated). Before *Coast Range Conifers*, the Oregon

Court of Appeals had followed those precedents in a case with facts almost identical to this one. *Boise Cascade v. Board of Forestry*, 131 Or. App. 538, 545-46, 886 P.2d 1033, 1037-38 (1994), *aff'd*, 325 Or. 185, 198, 935 P.2d 411, 420 (1997).[1]

Clearly, state courts may not tell this Court what the Fifth Amendment requires, especially when that dictate would transform the nature of the disputed property mid-litigation. Oregon property law does not create a barrier to review by this Court.

CONCLUSION

Petitioners respectfully urge the Court to grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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November 5, 2007

[1] The litigation in *Boise Cascade* is ongoing; it is now before the Oregon Court of Appeals for the fourth time, after a jury verdict in favor of the landowner, because of the change of law stated in *Coast Range Conifers*.